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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN J. ADKINS, ET AL.,
Petitioners,

v.

GENERAL MOTORS COPORATION,ET AL
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether Certiorari should be granted to resolve a conflict between the Fifth and Sixth Circuits over application of the Court's analysis in Section 301 preemption cases as it applies to state common law fraud and implied contract claims where the Sixth Circuit preempts fraud claims that merely "relate" to the collective bargaining process and the rule in the circuit requires preemption of individual contracts whenever the employee also has a collective one, whereas the rule in the Fifth Circuit analyzes preemption as dependent upon actual need to "interpret" and to be "substantially" dependent upon a CBA so that fraud claims based upon oral misrepresentations, or independent contract claims based upon matters not directly covered in the CBA, are not to be preempted.

II. Whether Certiorari should be granted to establish appropriate judicial standards for defining or applying controlling terms previously articulated by the Supreme Court in cases involving Section 301 preemption where petitioners assert that, at worst, their state claims involve "parallel [state] rights" that only "tangentially concern" a provision in the collective bargaining agreement and is only of "peripheral concern" to federal interests.

III. Whether Certiorari should be granted to clarify Section 301 preemption principles set forth in Caterpillar v. Williams and Lingle v. Norge Division of Magic Chef as applied to state common law fraud claims, to determine: (1) the extent a provision in a collective bargaining agreement may provide relevant evidence towards an element without preempting the action, (2) appropriate analysis of common (as compared to statutory) law

elements and , (3) survivability of state claims based upon conduct and oral representations outside the collective bargaining agreement..

IV. Whether the Circuit's rule that a contract relationship cannot exist outside of a collective bargaining agreement is a departure from the standards set forth in Caterpillar v. Williams which recognizes independent contractual relationships and further, whether the lower court's ruling that Section 301 preemption occurs whenever "a court adjudicating [trying the] claim must [eventually] determine rights arising under [or relating to] a collective bargaining agreement" is a departure from the standards set forth in Lingle v. Norge Division of Magic Chef which recognizes a valid state claim may include both interpretation of a collective bargaining agreement and a separate state law analysis that does not turn upon the agreement.

V. Whether under the rationale of Farmer v. Carpenter, a court's preemption analysis may consider discrimination as a factor in the totality of circumstances alleged to constitute outrageous conduct in a state action for intentional infliction of emotional distress and, further where the district court finds the alleged conduct survives preemption, whether said finding can be overturned on appeal by extending preemption analysis to include assessing the merits of outrageousness.

PARTIES TO PROCEEDING

1. For Petitioner: John Adkins

As petitioners number 817 persons they are setforth separately in

Appendix B

2. Defendant: General Motors Corporation (GMC)

3. Defendant: International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE)

4. Defendant: Local 801, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (Local 801)

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JURISDICTIONAL STATEMENT

The judgement of the Court of Appeals for the Sixth Circuit was issued on October 15, 1991 (App. B). This Court has jurisdictional pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article VI -(supremacy clause)

> This Constitution, and the Law of the United States which shall be made, under the Authority of the United states, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment V- Due Process Clause

> No person shall...be deprived of life, liberty, or property, without due process of law... .

Amendment X- Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code (U.S.C.)
Section 301, Labor Management
Relations Act, 29 U.S.C. Section 185(a)

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Federal Rules of Civil Procedure (Fed. R. Civ. Pro.)

Rule 12(b)(6)

(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ...(6) failure to state a claim upon which relief can be granted ... .

Rule 56(a),(b)

(a) For claimant

A party seeking to recover upon a claim, counterclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary

judgment by the adverse party, move with or without supporting affidavits for a summary judgement in his favor upon all or any part thereof.

(b) For defending party.

A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is brought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF THE CASE:

This case concerns the proper application of standards and terms announced by the Court in evaluation of federal preemption of state claims under Section 301 of the Labor Management Relations Act, 29 USC 1985 (Section 301/LMRA). The case is also illustrative of the conflict, confusion and entrenched debate over jurisprudence which divides the circuits on the preemption issue.

The litigation arose during a period of economic recession, corporate reorganization and employee layoffs from 1979 into 1981. In the last decade, the 817 plaintiffs/petitioners steadfastly sought to complete only the first hurdle towards trial on the merits. Years after the complaint was filed, federal preemption was imposed to prevent the litigation. Initially the plaintiffs sought resolution of both federal and pendent state claims in an action filed in district court in January, 1982. The federal claims were deemed

hybrid Section 301 action. Upon defendants' (respondents') motion, the federal claims were found time barred under what was then a new rule that tracked the six month limitations period of section 10(b) of the National Labor Relations Act (NLRB), instead of the six year statute of limitations recognized prior to Delcostello v. International Bhd. of Teamsters (1983) 462 U.S. 151. See, Adkins v. GMC (S.D. Ohio 1983), 523 F. Supp. 1188, aff'd. 769 F.2d 330. However, many of the initial state claims survived. Adkins v. GMC (S.D. Ohio 1983), 556 F. Supp 452. Declining to exercise pendent jurisdiction, the district court dismissed the state claims without prejudice.

Meanwhile, the original plaintiffs were joined by several hundred others who had come to realize how deeply they were misled, the scope of their injuries and resulting damages. On September 19, 1983, this action was instituted in the Common Pleas Court for Montgomery County Ohio, Case No. 83-2596. Expanding upon the

original complaint, recovery was sought upon state-based claims of fraud and misrepresentation (count II), implied independent contract and promissory estoppel (count III), intentional infliction of emotional distress (count IV) and loss of consortium. The case was based, on actions and rights outside the collective bargaining agreement ("CBA"). Generally, each claim was based on two separate courses of conduct: The most egregious and independent occurred three months after the CBA was ratified and continued for a year. The other course of conduct occurred prior to the ratification vote. In order to distinctly understand the scope and independence of petitioners' claims it is important to understand the relationship and history of the parties. Otherwise, there is danger the claims will be taken out of context and lumped into a catchall section 301 action, as was done in the appellate court below.

The background of the case touches upon many relationships some of which happen to be

member-union, employee-employer, union-management, but these are not controlling. The dominant relationship was less "arms length"; it was one founded upon a nature of trust, honesty, personal commitment essentially, a fiduciary relationship.

Prior to 1971, General Motors Corporation (GMC) operated plants in the cities of Dayton and Moraine, Ohio under its Fridgidare Division. Workers were unionized through the International Union of Electrical, Radio and Machine Workers, AFL-CIO- CLC (IUE) and one of its area affiliates, Local 801. The operation of the plants involved both appliances and automobile air conditioners. Wages for both types of work were keyed, not to the appliance industry, but to the higher scale of the automotive industry because workers readily transferred, or "flowed," from appliance to automotive jobs and back again.

In 1971 GMC negotiated a lower wage scale for workers on appliance projects. However the above noted custom and practice of "flowing" continued. Workers flowed or transferred to automotive project jobs (now at a higher scale) when openings occurred or to flow or transfer back to the appliance jobs to avoid layoff by bumping those with less seniority. In 1974 GMC reorganized, splitting the automotive air conditioning facilities from Fridgidare and into Delco Air Conditioning (later known as Harrison Radiator Division). Still the flow or transfer practice continued.

This flow arrangement was not memorialized until September 1976 when it was formally incorporated in the new CBA which ran from September 1976 until September 1979. This memorialization of the flow practice was known as the "Bridge Agreement." However, there were some changes from past custom. Flow rights were to continue only until the occurrence of a condition which would be satisfied by GMC,

offering each then existing Fridgidare employee the opportunity to permanently transfer to the new Delco Division plus the hiring of 900 additional new Delco workers. As a practical matter it was not foreseeable that this condition would be satisfied for many years (Comp. para. 19-23,27).

By 1979, of the 5,500 original Fridgidare employees covered under the CBA's Bridge Agreement, 2,000 transferred to Delco. Plaintiffs herein are from this group. The remaining 3,500 for various reasons had yet to exercise rights under the Bridge Agreement. The 2,000 were replaced at Fridgidare by 2,500 new hirees who had no rights under the Bridge Agreement

In early 1979, GMC announced it was closing its Fridgidare division, selling off the assets but retaining the Dayton and Moraine plants for conversion to automotive under the Chevrolet Division. Petitioners allege (<u>as background not</u>

as the basis for state suit) that a conspiracy transpired among the Respondents, with the objectives of maintaining power and control in deprivation of the rights of many of the 2,000 as employees and under federal law.

From the union's perspective, the closing would idle 6,000 members (above noted 3,500 plus the 2,500 newly hired). These layoffs would effect the power, prestige and financial muscle of Local 801. On the other hand, the two year conversion process meant jobs, and after conversion - more jobs, all needing union representation. IUE wanted to maintain its status as bargaining agent when the plants reopened but feared it would lose its position to the United Auto Workers. GMC, for its own reasons, secretly wanted to retain IUE as the bargaining representative. GMC had the additional objectives of dividing labor and removing senior employees (petitioners) who were at a higher wage scale, replacing them with new lower paid workers. The plan was to abrogate the Bridge Agreement, which the unions

were willing to sacrifice to maintain their private interest. In the process of obtaining these objectives, however, the Respondents committed acts which serve as the basis for this suit (Eg. Compl. para 15,16,25-27 and 43-48).

The conspiracy came to life in a series of meetings, between January 31 and February 20, 1979, among GMC, IUE and Local 801. IUE and Local 801 would be recognized as the bargaining representative at the new Chevrolet plants. However, only laid off Fridgidare workers were to be recalled; either as temporary workers for converting the buildings or, after conversion, as permanent factory workers. The Bridge Agreement was to be abrogated. These meetings did not include negotiation of layoffs which GMC was to institute at the Delco plant later that year.

Through overt acts, omissions, fraudulent misrepresentations and concealments with the objective of excluding the 2,000, jointly and

individually, from the notification and ratification process; respondents succeeded in abrogating the Bridge Agreement. To facilitate the conspiracy two membership meetings were called. The first was a hurried one, on short notice, for February 23, 1979. This obstensively was to approve the effects of Fridgidare layoffs. (Comp. para. 29,33-34). The second, for September 18, 1979, was ostensibly to approve the Delco CBA.(Comp. para.35) Neither meeting discussed the abandonment of the Bridge Agreement. It was concealed. The Delco CBA did not mention the abandonment of the Bridge Agreement, it just omitted the provision. The plan was to respond to any inquiries by insinuating that the customary "flow" practice that existed before the 1976 Bridge Agreement was intact or the Bridge otherwise still existed. It is the manner of respondent's behavior towards petitioners during this time which serves the basis of the emotional distress claims. (Complaint para. 30-37).

The remaining state claims arise from separate events occurring between February 1980 through January 1981. Shortly after ratification of the local Delco CBA, Respondent GMC announced layoffs at the Delco plant. Through January 1981 respondents continued to try to keep secret the abrogation of the Bridge Agreement. The truth started to surface in February 1980 when petitioners (laid off Delco Workers) were not recalled, but instead were replaced by former Fridgidare workers. Rather than being straight forward and honestly telling petitioners they had lost their jobs, respondents made representations and innuendoes that the jobs would be forthcoming. Petitioners were told all they had to do was be patient and quietly wait. They were reminded of the old custom of "flowing" and told nothing of the destruction of the Bridge Agreement. They were reminded of new Chevrolet plants. Promises of employment were made, individually and in groups. So petitioners waited, always being reassured by those who cultivated their trust that jobs would be theirs.

Respondents planned the chaos and turmoil surrounding plant closings, openings, and thousands of job transfers (including temporary plant conversion jobs). The respondents' plan prospered while petitioners were told to wait.

Finally, in January 1981 the Chevrolet plants were fully converted. Workers from Fridgidare, including the previously mentioned 2,500, were called in. The Plaintiff-Petitioners began to realize they were duped as they learned about how the Bridge agreement was destroyed without their knowledge, how the custom of "flowing" that existed before was abandoned, and most importantly how promises of jobs were empty lies. Petitioners acted and forebore in reliance of respondents' promises and representations of jobs. Petitioners were not merely misled, but suffered significant injuries; some were economically ruined, others psychologically injured by those whom they trusted who, in laughing admission, later called them cry-babies and ridiculed them. Petitioners stated causes of

action in implied contract/promissory estoppel, fraud and misrepresentation and some of their emotional distress claims arise out of this conduct and oral misrepresentations. (Comp.para 39-42, 73-79, 89)

Asserting federal question, respondents removed the case to district court. Petitioners moved to remand. On January 20, 1984, portions of the complaint were ordered remanded, as arising under state law. Adkins v. GMC (S.D. Ohio 1984), 578 F. Supp 315. On March 9, 1984, asserting the six month statute of limitations, respondents moved for summary judgment for the portion of the complaint deemed to arise under Section 301. Not until June 26, 1987 was the motion granted. At that time, by the attached letter, respondents were invited to move for reconsideration of the January 20, 1984 decision granting petitioners motion to remand.

On July 8, 1987 respondents moved for reconsideration. Petitioners response (then and

later on appeal), essentially was that the state claims were independently based and not inextricably intertwined or substantially dependent on the terms of the CBA and, at worse, involved parallel and supplemental state causes of action that only tangentially concerned a CBA, yet foster advancement of deep local concerns.

On August 16, 1988 the district court preempted the case except for the emotional distress and consortium claims in relation to paragraphs 30, 33, 36 and part of 31 in the complaint. Reasoning that the conduct was not within Section 301, the district court ordered a remand. Respondents moved for summary judgment over the remainder of the case, again asserting statute of limitations. This motion was granted on January 24, 1990, but the district court overruled any reconsideration of its remand order.

Petitioners appealed the preemption of their claims to the Sixth Circuit. Respondents cross appealed.

On October 15, 1991 the Sixth Circuit affirmed the preemption of petitioners state-based claims of fraud and misrepresentation, breech of implied contract and tortious interference, and expanded the order to engulf the emotional distress and consortium claims which the district court found outside the scope of Section 301. Adkins v. GMC (6th Cir. Oct 15, 1991) unreported case no.s. 290-3164, -3234, -3235. (herein after referred to as Adkins).

REASONS FOR GRANTING THE WRIT

I. FIRST QUESTION PRESENTED

Petitioners submit that certiorari should be granted to resolve a conflict between the Fifth and Sixth Circuits. The conflict centers on the meaning implied in terms adopted by the Court to guide the lower courts in analysis of state law claims with preemption considerations embodied in section 301 . This is not to say the lower court failed to use some of these terms. However, the meaning was diametrically opposed to the understanding advanced by petitioner, supported by decisions of other circuits and by this Court. When read with other Sixth Circuit cases, the decision reflects a jurisprudence which prohibits union members from enjoying rights, both in the nature of contract and other torts, outside the collective bargaining agreement (CBA) and has the effect of absolutely immunizing unions from state-based suits in fraud, misrepresentation, and tortious interference of contract .

The Sixth Circuit decision also appears in conflict with Caterpillar v. Williams (1987), 482 U.S. 386, 396-97 n. 10 ("not every dispute concerning employment or tangentially involving a provision of a collective bargaining agreement is preempted... . Even under section 301 we have never intimated that any action merely relating to a contract...arises exclusively under that section.")

Petitioners' analysis begins with the Sixth Circuit's disposal of their contract claims and the circuit's jurisprudence. The conflict with a recent Fifth Circuit decision is then examined Wells v. G.M.C. (S.D. Miss 1988) 721 F. Supp. 107, affd (5th Cir. 1989), 881 F.2d 166, reh. den. 887 F.2d 1083, cert.den. _____ U.S._____, 110 S. Ct. 1959. (Wells). The factual similarities of the two cases will be discussed as a prelude to analysis of the lower court's disposal of petitioners' fraud and related claims. This analysis reveals that the Sixth

Circuit's understanding is in conflict with other circuits. For example, the Wells case limits preemption of state claims to those which "substantially" depend on analysis or interpretation of a CBA, the Sixth Circuit preempts whenever it perceives the claim might "relate" to a CBA. Adkins supra at 9.

> "Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable... We know of nothing to prevent the employee's making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not a part of an unfair labor practice.".

J.I. Case Co. v. Labor Board (1944),321 U.S. 332, 339. Forty years later some of these principles were applied by the Court to prevent Section 301 preemption of a state contract claim

by union employees under a CBA. Caterpillar Inc. v. Williams, supra. In that case the Court stated, "a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state contract rights, so long as the contract relied on is not a collective bargaining agreement." Id. at 396. The Court further noted that the CBA could be raised as a defense, id. at 397-398, such defenses have no bearing on preemption, id. at 398-99, and if the CBA relates to the plaintiff's claim it might not ultimately be a sufficient defense. Id. at 396-97, n.10.

Petitioners' implied contract and related claims, are based on representations made outside the then existing CBA. However, the lower court's analysis of the Caterpillar case emphasized "the defendant employer might successfully raise federal preemption as a defense". Id. at 13-14. The lower court then noted potential defenses in the instant case, id. at 17-18, and summarily preempted petitioner's state contract and tortious

interference claims, but failed to consider that the "bridge agreement" mentioned in the complaint was not part of the existing CBA. As to petitioners' claim that the contract was outside the collective bargaining agreement and events directly relating thereto, or at worse, was only 'tangentially related,' the lower court indicated that such considerations were irrelevant. Id. at 17, 19-20 .

The lower court's decision appears anchored in the jurisprudence of other cases, authored by the same judge at approximately the time appellate briefs were filed. Therein, it was stated "the collective bargaining process prohibits a bargaining unit employee from engaging in separate negotiation with the company and precludes any actions to enforce such agreements." Fox v. Parker Hannifan Corp., (6th Cir. 1990), 914 F.2d 795, 801 (preempting implied contract and promissory estoppel claims predicated on alleged company and union promises made directly to plaintiff) (Boggs, J.).

The rule announced by the Sixth Circuit in the Fox case permeated the treatment of petitioner's claim. Further, Sixth Circuit jurisprudence relative to Section 301 insinuates union immunity. Dicta found in another case indicates that, while common law actions against employers may escape preemption, "[o]nly claims based on union discrimination in the employment setting are subject to the preemption principle, because they realistically threaten to interfere with the federal regulatory scheme." Krafel v. Pepsi Cola Bottlers (6th Cir 1990), 135 LMRM 2520, 2525-2526 (Boggs J). See also, Jones v. G.M.C. (6th Cir. 1991), 939 F.2d 380, 383 (Section 301 preempts state law "when... employees covered by a CBA rely upon the existence of a separate individual employment contract giving rise to state law claims.")

Examination of the underlying facts and legal analysis in the Wells case with the instant case reveals a conflict. Both cases involve a class action suit by former G.M. automotive

employees. The employees were covered under a collective bargaining agreement and were represented by IUE and a local affiliate during the early 1980's, a period of downturn in the automotive industry. Wells, supra. F. Supp at 109. Adkins , supra at 4-5. Both cases involve claims that, when layoffs were occurring, oral representations and promises were also made which were believed and resulted in plaintiffs' either action or forbearance of action in reliance thereupon and to their detriment. However, some of the behavior complained of in the Wells case was more or less clandestine than in the instant case. Specifically, the plaintiffs in the Wells cases were told they were facing permanent layoff. Wells, supra. In that context, the Wells plaintiffs were offered a plan, instituted by GM and IUE, whereby union members could sell off their seniority rights and be voluntarily terminated ("VTEP"). The VTEP plan was made a supplement to the collective bargaining agreement. Id., 721 F. Supp. at 113. The Wells plaintiffs alleged that in meetings on VTEP,

representations were made that those choosing to sell their seniority could later compete for new job openings if they arose. These representations were relied upon but, after selling their rights, plaintiffs were barred from applying for new openings. A state suit for breach of implied contract and fraud was removed to federal court.

The difference in the decision of the Fifth Circuit, holding fraud and contract claims were not preempted, and the decision of the Sixth Circuit, preempting petitioners' fraud, contract and tortious interference claims is simply a function of a difference in approach to Supreme Court precedent. For example, the Wells case emphasized, that Section 301 preemption was dependent upon finding that "the resolution of the particular dispute must be substantially dependent upon analysis of the terms of a collective bargaining agreement." Wells, supra F.2d at 173 (emphasis original). The Sixth Circuit's preemption of petitioners' claims swept the significance of the word "substantial" under the

rug. The Sixth Circuit imposed preemption whenever it believes the state claim merely "relates to various collective bargaining agreements." Adkins, supra at page 9. The failure of the Sixth Circuit to attach significance to the Supreme Court's use of terms such as, "substantially" is not an isolated example. The Fifth Circuit also emphasized several other concepts announced by the Supreme Court which are relevant to petitioners' claim but disavowed or ignored by the Sixth Circuit.

The Wells decision also followed the Supreme Court's pronouncement that "not ...every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement is preempted." Wells, supra F.2d at 173 n.13, "Section 301 is not implicated unless resolution of the state claims requires interpretation of a collective bargaining agreement...[and accordingly] a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights independent of that

agreement, including state law contract rights, so long as the contract relied on is not a collective bargaining agreement." Id. at 173 (emphasis original) (quoting and citing Lingle v. Norge Div. of Magic Chef, Inc (1988), 486 U.S. 399, and Caterpillar Inc. v. Williams, supra.) As noted above, Sixth Circuit jurisprudence disavows the possibility, or even the concept, of union employees having a contract independent of the collective agreement. See, Fox v. Parker Hannifan Corp. supra. This jurisprudence resulted in the summary preemption of petitioners' state contract claims that were independent of, and subsequent to, the collective bargaining agreement. Oral representations are without effect even if detrimentally relied upon by this approach.

The intercircuit conflict also extends to petitioners' fraud claims. The Wells decision focused on the basis of the claim, to wit, oral promises and oral representations that VTEP contained provision allowing for future

employment. The Wells court noted that actually, except for potentially minor provisions, VTEP was essentially silent on future employment. The parties did not dispute the absence of any provision on the right to future employment. Accordingly, and in reality, "the dispute is a highly fact bound one concerning what was said, or promised, at the meeting. The defense to such a claim is not that the VTEP might be construed to say otherwise; rather, it is that `we made no such representation' or that `no such representation could have been made given the VTEP's provisions.' " Wells, supra F.2d at 173.

The Sixth Circuit's approach to petitioners' fraud claims is in sharp contrast with the Wells case. Petitioners' claims revolve around two groups of oral representations and separate detrimental reliance; one prior, the other, many months after, ratification of the CBA. The core of theses oral misrepresentations relates to a bridge agreement which all parties agree was not contained in the

pertinent collective bargaining agreement. Nonetheless, the Sixth Circuit held "[t]he fact that these [oral] misrepresentations took place outside the context of collective bargaining is immaterial." Adkins, supra at 17. There was no discussion about petitioners' assertion that, at worse, the fraud claim was merely tangentially related to any collective bargaining agreement, the significance of the state interest, or even that the action was only of peripheral concern to federal interest.

The conflict is not isolated between the Fifth and Sixth Circuits. Cases from other circuits support petitioners' position and disavow the approach of the Sixth Circuit. Anderson v. United Auto Workers (D.Kan. 1990), 738 F. Supp 441, 442-44 (employing a balancing test and holding a state tort action against defendants, union and employer is not preempted merely because it "relates" to a provision in a collective bargaining agreement.); Karetnikova v. Trustees (D.Mass. 1989), 725 F. Supp. 73,79 (employing a

balancing test in denying preemption and noting: "A...more important reason the claim is not preempted is that although plaintiff's claim may refer to a CBA in some respects, it does not substantially depend upon interpretation of the CBA. Not every state law claim that relates in some way to a provision in a collective bargaining agreement is preempted."); Paradis v. United Tech.. (D.Conn. 1987), 672 F. Supp. 67,70-71-(state claims in the nature of fraud hinge not on what may be in a CBA but rather what was represented or not represented "irrespective" of the contents of any CBA.); Anderson v. Ford Motor Co. . (8th Cir. 1986), 803 F.2d 953, 957 (holding fraud " is a common law tort deeply rooted in local standards of individual and social responsibility..[and] does not derive or depend on an underlying contract.")

Regardless of the approach, the consensus among the circuits is that the conflicts are widespread and deep. Id. at 958-59 (noting conflict with Ninth Circuit); Hanks v. GMC (8th Cir 1990),

906 F.2d 341, 344, n.4 ("Ninth Circuit... unjustifiably extends (Supreme Court precedent)"); McCormick v. AT&T Tech.. (4th Cir. 1991), 934 F.2d 531 and 538-539 (Dissenting opinion); (in a 4-3 decision, Judge Phillips observes that his "disagreement with section 301 preemption analysis is fundamental. It is a disagreement that simply reflects a wider inter-circuit conflict on this issue that has developed in recent years as lower courts have sought to apply the Supreme Court precedents."): Paradis v. United Tech., supra at 69 (Noting that the current status of section 301 preemption "in its application by different courts, have led to different results in similar fact scenarios."); See also, id. at 71,n.7 (observing split on fraud among the circuits including Sixth).

Thus, the need for clarification is great. The issues are clear and divisions between the circuits are great. Moreover, the lower courts readily acknowledge they are at odds, sometimes in less that flattering terms. The instant case reflects the

divisions. Granting certiorari will resolve these divisions now and for the future.

II. SECOND QUESTION PRESENTED:

The United States Supreme Court has articulated the law in a variety of phrases in their analysis of Section 301 preemption cases. Some of the phrases favor a finding of preemption, such as; 'substantially dependent' and 'inextricably intertwined.' Other phrases are associated against a finding of preemption, such as ; 'tangentially related,' 'peripherally concerned' and 'parallel [state] rights'. To date, the Court has not specifically defined these terms and, unfortunately, the lower courts have failed to complete the process. Petitioners request certiorari so the Court may clarify the meaning of controlling terms used in Section 301 issues, by either identifying the process through which their meaning can be ascertained or by otherwise

clearly defining their meanings and appropriate uses.

Phrases such as "tangentially related", or "substantially dependent", are descriptive in nature. When viewed together within the cases the Court employed them, they define a process and not a dictionary definition. The lower courts have utterly failed to provide a workable definition. The inconsistency by which the lower courts apply these phrases makes it evident that they are not susceptible to a common understanding and usage. See, eg,. Anderson v. Ford Motor Co., supra at 958-59; Hanks v. G.M.C. supra at 344, n.4; McCormick v. A T & T Tech., supra at 538-39; Paradis v. United Tech., supra at 69 and 71 n.7. (note refers to conflict with Sixth Circuit over rationale in fraud and misrepresentation cases.)

The problem is partially a consequence of lower courts failing to consistently recognize that federal interests are often best served by

recognition of parallel and supplemental state causes of action. "Federal labor law in ...[a] sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents accomplishment of the purposes of the federal act... . Thus the Court has recognized that it cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously much is left to the States." Metropolitan Life Ins. Co. v. Massachusetts (1985), 471 U.S. 724, 756-757. As a general rule, "courts sustain local regulation unless it conflicts with federal labor law or frustrates the federal scheme", Allis-Chalmers v. Lueck, (1985) 471 U.S. 202, 208-209, "by interfer[ing] with the effective administration of national labor policy." Farmers v. Carpenters, (1977), 430 U.S. 290, 298. See United States Constitution Amendment X.

The NLRA and LMRA seek to create equal bargaining power in the workplace. The purpose

is to provide a process by which a CBA can formulated and issues directly related to a CBA can be resolved. Certainly, there are provisions and sanctions for those who would act unfairly or unequal during this process. Beyond this, the law was not designed to address malicious, outrageous or egregious behavior generally associated with intentional torts. See Farmers v. Carpenters, supra. Generally, federal sanctions and damages would not be tailored to account for such extreme behavior. See e.g. Id.; Keehr v. Consolidated Freightways (7th Cir. 1987), 825 F.2d 133, 137-138; Krashna v. Oliver Reality, Inc (3d Cir. 1990), 895 F.2d 111, 115 ("state claim exceeds scope of...rights under LMRA.) Yonover, Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined, 34 So. D. L. Rev. 63, 78-79.

The procedural posture of this case underscores the importance of recognizing the state interest. One of the reasons for the states providing a

longer statute of limitations is the psychological fact that those so injured are unlikely to be readily capable of recognizing rights and damages in a short period of time. See, eg. Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised (DSM-III-R), American Psychiatric Association at 218-222 (Major Depressive Episode-lasts 6 months or longer), 247-251 (Post Traumatic Stress Disorder) and 251-253 (Generalized Anxiety Disorder). The six month statute of limitation retroactively imposed upon petitioners to defeat their Section 301 claims may have been appropriate for the limited federal purposes of enforcing the CBA. However, preemption of the state claims imposes an unrealistic burden on those petitioners with emotional injuries and ultimately forecloses recovery to a whole class of helpless plaintiffs. Moreover, if petitioners had managed to preserves federal claims, federal recovery could not address their injuries, See eg. Yanover, supra at 77-79. Such foreclosure borders on an arbitrary denial of fundamental

substantive principles embodied in Fifth Amendment Due Process. Bolling v. Sharp (1954), 347 U.S. 497, 499 (Federal government is limited by concepts similar to equal protection embodied in Fifth Amendment substantive due process.) See Scaccia, Title VII and Treaty Rights Battles; The Verdict is Still Out, X ASILS International Law Journal 77, 91-96.

It is apparent from the nature and context of petitioners' state claims (and the eight years in federal court), that any appellate decision purporting to resolve the controversy should have defined its use of controlling phrases. The lower court should have employed a methodology that addressed petitioners assertions that their claims involve parallel and supplemental state causes of action that only tangentially concern a collective bargaining agreement yet foster the advancement of deep local concerns. See Farmer v. Carpenters, supra at 300-301. Had proper methodology been used the Sixth circuit would have found none of the state actions preempted.

Petitioners will first discuss a proper methodology for analyzing section 301 claims which take into account both federal concerns and state interests. Petitioners then examine the general approach by the lower court. Petitioners analysis reveals that their claims should not have been preempted even assuming arguendo that there was some relation to the CBA. Petitioners' claims are only peripheral to federal interest and tangential to any collective bargaining agreement. Concepts of state parallelism are demonstrated as controlling since federal interests are best served by recognizing the state's substantial interest in providing petitioners' claims a forum.

The appropriate standard for judicial review requires a threshold inquiry of whether, under the circumstances alleged, the claim appears to be embraced within the federal legislation. If not, there is little or "no risk that permitting the state cause of action to proceed would result in regulation of conduct Congress intended to

protect." Farmer v. Carpenters, supra at 298. Where the threshold inquiry indicates possible federal preemption, further analysis is required to determine whether the federal purpose underlying the doctrine of preemption is best served by its application. Still, the first question remains as to what standard controls the threshold inquiry.

The threshold inquiry should focus on state black letter law and avoid embroiling (possibly for years) the federal courts in issues more appropriately left for subsequent phases of litigation. The state courts already have concurrent jurisdiction and are duty bound to apply federal common law where appropriate. State black letter law was the threshold inquiry in Lingle v. Norge Div. of Magic Chef, supra at 407-410. The state black-letter elements were: (1) discharge and (2) a state prohibited motive for discharge,. "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither... element requires a court to interpret

any term of a collective bargaining agreement. Thus, the state law remedy.....is independent of the collective bargaining agreement in the sense ...that matters for section 301 pre-emption purposes: resolution of the state law claim does not require construing the collective bargaining agreement." Id at 407 (emphasis added). State black-letter law was also the threshold inquiry pre-empting a state claim in Allis-Chalmers v. Lueck, supra at 216-218 ("Under Wisconsin law, the tort intrinsically relates to the of the nature and existence of the [collective bargaining] contract."). Accord, Electrical Workers v. Hechler (1987), 481 U.S. 851, 858-862 ("Because the [tort] right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability ... inevitably will involve [collective bargaining] contract interpretation."). See also McCormick v. A T & T Tech., Inc., supra (dissenting opinion).

Petitioners submit that the state black letter law in their claims does not require examination of the CBA. This is more fully demonstrated in the three subsequent questions presented. To avoid redundancy they are incorporated by reference. Importantly, assuming arguendo the claims do not survive the threshold inquiry, further analysis reveals the claims still should not be preempted.

> " When it is clear or may fairly be assumed that activities which a state purports to regulate are protected...or [prohibited]..., due regard for federal enactment requires that state jurisdiction must yield....But the same considerations that underlie... [preemption] led the Court to recognize exceptions in appropriate classes of cases. [The Court] refused to apply the preemption doctrine...if that activity was merely a peripheral concern to the LMRA or touched interests so deeply rooted in local feelings and responsibility that, in the absence of compelling congressional direction we

could not infer that Congress had deprived the States of the power to act."

Farmer v Carpenters, supra at 296-297 (emphasis added). Though the Farmer case involved Garman preemption, Section 301 preemption analysis should not be significantly different in form; both focus on the collective bargaining process, only Section 301 emphasizes the CBA and grievance process whereas Garman emphasizes the preeminence of the NLRB. Thus, the second step of analysis is examination of countervailing considerations. At this phase section 301 preemption would "depend [or turn] upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." Id. at 300-301 (emphasis added). In other words, the interest of the state/individual is balanced against the federal interest to determine whether the "state cause of action would interfere with effective

administration of [the appropriate] national labor policy." Id.

The national labor policy of Section 301 cases centers on uniformity in interpretation of collective bargaining agreements. The objective is to avoid labor disputes arising over uncertainty in the meaning of provisions during negotiations, and later administration, of a CBA. Allis-Chalmers v. Lueck, supra at 209-210; Teamsters v. Lucas Flour (1962), 369 U.S. 95, 103. Though effectiveness of arbitrations is also a Section 301 concern, Hanks v. G.M.C., supra at 344-345, it is not an issue in the instant case. Grievance procedures have long ago been ruled illusionary and not applicable to the dispute. Adkins v. GMC (SD Ohio 1983) 573 F. Supp 1188, 1196-97.

Analyzing the state and federal interest, with the facts of the case reveals that petitioners and respondents agree that the 1979 CBA was intended to abolish transfer rights known as a

"bridge agreement." Adkins, supra at 18. The bridge agreement simply is not in there. The nonexistence of a provision does not create a federal question on uniform interpretation of a term in a CBA. Wells, supra. The agreement is merely backdrop.

Petitioners state claims are based upon two categories of behaviors. The first involves oral statements and other actions beginning four months after ratification of the agreement. The second relates to oral and written statements and concealments and other actions prior to the vote ratifying the CBA. In both, the legal issue is what was said and done or what was not said or done, not the meaning of a 'bridge agreement' or what should be interpreted in the CBA. Since the CBA is not the issue and the dispute does not directly involve its interpretation, petitioner's claims only tangentially involve the CBA. Wells, supra F.2d at 172-175; accord, Caterpillar Inc. v. Williams, supra, (oral and written

written representations alleged occurred outside the agreement).

The only other "provision" identified by the lower court as reason for preempting petitioners claims was seniority. Again, petitioners are not per se asserting seniority rights under the CBA. Rather the claim is that statements were made that included the term "seniority." The issue is what was said and understood at the time, not what was in the CBA. Perhaps the lower court was indicating seniority under the CBA may also play a role in evidence. Maybe so, but the case still does not involve a substantial federal interest under the rationale of Lingle v. Norge Division of Magic Chef, supra.

The Lingle decision noted that the state issue was motive for discharge, essentially a factual inquiry. Id at 407. Obviously, at trial relevant evidence demonstrating proper or improper motive would include compliance or noncompliance with discharge procedures in the

CBA. Also, the CBA agreement would be important for assessing damages. Such indirect use of the CBA had no affect on the state claim.

> "although federal law would govern the interpretation of the agreement...the underlying state claim, not otherwise preempted, would stand. Thus as a general proposition,a state law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted....not every dispute tangentially involving a provision of a collective bargaining agreement is preempted by [Section] 301."

Id at 413 n.12.

Without a more direct need to interpret the CBA, federal policy under Section 301 is not

implicated. Federal interest is best served by recognizing the state claim. Though some of the behavior alleged may also constitute an unfair labor practice, fraudulent and/or outrageous behavior far exceeds what is needed to satisfy a federal violation. See, eg.. Farmers v. Carpenter, supra. The limits of federal enforcement only encourage those who intend to act fraudulently, maliciously, or outrageously. Without the state claims, these federal limitations are counterproductive to the labor peace at the core of federal legislation. Similarly, labor unrest is encouraged by those frustrated with partial or inadequate justice. Petitioners suggest that this, at least partially, explains why factual parallelism, to support nonpreemption of state claims is approved in Lingle v. Norge Div. of Magic Chef, supra at 408-410.

The state also has a strong interest in allowing a forum for petitioners' claims. "Fraud is a common law action deeply rooted in local standards of individual and social

responsibility....A claim of fraud does not derive from nor depend upon an underlying contract." Wells supra F. Supp. at 107. States also have "an overriding interest in protecting its citizens from intentional infliction of emotional distress." Anderson v. United Auto Workers, supra at 443. Petitioners asserted mental anguish in their fraud and loss of consortium claims. Substantial burden is placed on state resources if those who cause such injuries can readily escape responsibility for maintenance or recover.

Petitioners' quasi-contract and promissory estoppel claims also advance federal interest. First, it is doubtful whether quasi-contract or promissory estoppel claims are cognizable under LMRA. See eg., Marine Transport Lines, Inc v. International Organization of Masters, (S.D.N.Y. 1986), 636 F. Supp. 384, 390-391; Caterpillar v. Williams, supra. Without the state claims, those who do not wish to abide by their representations and promises have nothing to fear regardless of the damage that results. Such

immunity hardly serves the national interest of preventing labor unrest.

The Sixth Circuit wholly ignores analysis of federal or state concerns. No mention was made of state parallelism or matters of peripheral concern to federal interest. Instead, the court held as policy: "The fact that these misrepresentations took place outside the context of collective bargaining is immaterial." Adkins supra at 17. This direct conflict with the Wells case, may have occurred from the court feeling a need to examine the CBA for provisions that might relate to a nonexistent bridge agreement. However, judicial inconvenience is not the focus for finding preemption (though it may support remanding). Thus, by improper methodology the lower court failed to identify the true issue, to wit, what was said or not said by defendants and their agents.

The Sixth Circuit also overruled the district court's finding that some of petitioners emotional

distress claims were not preempted. In doing so the court did not engage in a preemption analysis. Rather, the circuit court preempted based upon its feeling that petitioners' allegations of outrageous behavior were not factually sufficient. Thus, the court substituted a substantive Fed. R. Civ. Pro. 56(a) and (b), or Fed R. Civ. Pro. 12(b)(6) analysis, which was not at issue, for a pre-emption analysis. Had the lower court engaged in a preemption analysis it could have discovered all the alleged behavior was outside the LMRA and NLRA. The state action neither prohibited what is protected nor protected what is prohibited. The court would have discovered the intentional infliction of emotional distress claim was cognizable through concepts of state law parallelism. The error by the lower court is reflected in its failure understand that petitioners case is not based on the CBA.

III. THIRD QUESTION PRESENTED:

Petitioners fraud claims may not be preempted under Section 301 unless based "directly on rights created by [a] collective bargaining agreement ...[or] substantially dependent on analysis of a collective bargaining agreement." Caterpillar v. Williams, supra at 394-95. Petitioners state fraud claims do not seek to assert any right out of any CBA. The lower court did not identify how any specific element was substantially dependent on the CBA. The focus for the lower court was that petitioners claims "related" to a CBA. Id at 9.

The lower court was apparently concerned about potential use of various documents relating to the CBA to support,with other evidence, an element or a defense. Such concerns are misplaced. "[C]laims having their genesis in state law are not preempted merely because their resolution in part requires interpretation of a collective bargaining

agreement." Milne Employees' Assn. v. Sun Carriers Inc. (9th Cir Nov. 1991) 1991 U.S. App Lexis 27786 at P.8. Petitioners also find support in the Lingle case. In Lingle the issue of employer motivation was factually dependent, though, as a practical matter, compliance or noncompliance with discharge procedures in the CBA would be waived at the jury as evidence supporting a permissible or impermissible motive. Lingle v. Norge Division of Magic Chef, Inc., supra. The use of the CBA to determine damages was also approved. Id. at 413, n.12. In other words, it is "not required that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims." Jones v. Roadway Express, Inc. (5th Cir. 1991), 931 F.2d 1086, 1090.

Like other states, Ohio's elements of fraud are: (a) misrepresentation or concealment of a material fact; (b)knowledge of falsity or concealment (or such great indifference that knowledge can be inferred) ; (c) intent to induce

reliance; (d) justifiable reliance and; (e) damages. Cohen v. Lampco, Inc. (1984), 10 Ohio St. 3d 167,169. Wells, supra at 172 n.10. Milne Employees' Assn v. Sun Carriers Inc., supra. By themselves, these elements do not refer to, nor require evidence from a contract such as a CBA. Similarly, petitioners' factual allegations do not give these elements a preemptive life.

The primary events supporting petitioners' fraud claims started four months after ratification of the 1979 CBA and extended for almost a year (February 1980 through January 1981). The general core of these events are set forth in paragraphs 39 through 42 of the complaint,i.e., oral misrepresentations of job security and future employment when there was none. These misrepresentations each have a basis independent of any CBA. First, based upon 817 individual experiences. Second, based upon the behavior of the defendants Third, no provisions in the collective bargaining agreement embrace the oral

misrepresentations. Thus interpretation is not required.

Turning to the elements, material misrepresentation, knowledge and intent do not require interpretation of any CBA, but turn on the individual plaintiff's state of mind and "purely factual questions pertaining to the conduct and motivation of the [defendant when they allegedly made the representations]". Lingle v. Norge Div. of Magic Chef, supra at 407. Similarly, the damage and justifiable reliance elements are purely a factual inquiry. See Wells supra. As the lower court recognized, the misrepresentations to the 817 plaintiffs over a one year period evolved into two forms. Adkins supra at 16-18. First, there was concealment of the absence of a bridge agreement in the CBA. As noted previously, the absence of a provision does not trigger a preemption. Petitioners' reliance is based not on the CBA but solely upon relationship of the parties, the manner of communication (and withholding) and, generally,

the factual circumstances of the interaction. The second group of misrepresentations indicated that employment security existed despite what was not in the CBA. Again, the "dispute is highly fact-bound one concerning what was said, or promised, at the meeting[s]. The defense to such a claim is not that the ...[CBA] might be construed to say otherwise; rather, it is the 'we made no such representation' or that 'no such representation could have been made given the ...[CBA's] provisions'." Wells supra F.2d at 173.

Petitioners also assert a second category of fraud claims occurring prior to ratification of the CBA and based on concealing and misrepresenting the absence of a bridge agreement in contract. Once again, the issues are not what is in the agreement. Its not there. Rather, the issues are what was said or not said. Petitioners recognize this may be a closer question if, for no other reason than factually there was a potential for an unfair labor practice claim. However, this potential is not

fatal. First, the state issues and sanctions for fraudulent conduct are different as the behavior is more extreme that what is needed to create an unfair labor practice. Thus, there is support for state law parallelism. Lingle v. Norge Div. of Magic Chef, supra at 408-409. Second, to the extent preliminary analysis indicates possible preemption, the balancing of various interests and purposes underlying federal preemption indicate preemption is not appropriate. To avoid redundancy, petitioners incorporate by reference relevant portions of the analysis in the Second Question for review.

Accordingly, the lower court's preemption of petitioners' claims was a departure from the guidelines established by the Court's in the Lingle and Caterpillar cases. So as to rectify the error and avoid a compounded problem in future cases, certiorari should be granted.

IV. FOURTH QUESTION FOR REVIEW

Petitioners do not seek enforcement of a CBA. Rather they seek recovery for what was said and what they were led to believe. "Their complaints relate not to the agreement itself but to entirely separate conduct by [respondents]." Wells, supra F. Supp. at 111.

The Court has specifically stated that " a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights so long as the contract relied upon is not a collective bargaining agreement." Caterpillar v. Williams, supra at 396. The Court further indicated that a state based contract claim may be upheld even though it "tangentially involv[es] a provision of a collective bargaining agreement...[or] merely relat[es] to a contract within the coverage of [section] 301." Id. at 396-97, n.10.

In conflict with the Caterpillar, case the Sixth Circuit holds "employees covered by a CBA cannot rely upon the existence of a separate individual employment contract giving rise to state law claims." Fox v. Parker Hannifan Corp, supra at 801, Jones v. G.M.C., supra at 383. The lower court's legal and factual analysis of petitioners' contract claims is guided by this impermissible predisposition.

The elements of petitioners' state contract claims are offer, acceptance and consideration. Alternatively, a representation was made which they (individually) justifiably relied upon, to their (individual) detriment. None of the elements in either alternative look to the CBA. The basis of the claim is what was said, implied or promised by union leaders, their agents and the employer, in their discussions with petitioners (individually or in group). See, e.g. Wells, supra. Indeed, the CBA is silent as to any right to work at the new factories. Such silence removes the CBA from preemptive consideration. Id. The Sixth

Circuit failed to identify which element was substantially dependant upon or inextricably intertwined with, the CBA. Identifying the specific element would be impossible, petitioners' claims are based on oral representations outside the agreement. Instead, the lower court ruled the "critical inquiry is whether a court adjudicating must determine rights arising under a collective bargaining agreement." Adkins, supra at 17. The lower court identified these rights as seniority rights and bridge agreement rights.

As to the relevance of a bridge agreement, petitioners, individually and jointly, assert they were promised jobs that did not exist at two new factories. To the extent those promises referred to transfer rights known as a bridge agreement, such rights did not exist under the CBA. The absence of a provision in the CBA which is central to the dispute cannot create federal preemption. Wells, supra. Alternately, to the extent those promises related to the availability of

numerically sufficiently new positions at the new factories (that could be open to all union members) such an opportunity never occurred for petitioners. Again the issue is not the CBA, but the independent representations. Id.

As to the relevance of seniority, focusing on conversations paraphrased in the complaint using the phrase "seniority", the lower court characterized petitioners contract claims as based upon seniority provisions existing in the CBA. The lower court failed to appreciate that this complex class action is based on individual promises of jobs and individual belief that jobs were forthcoming. Under such circumstances the elements of reliance (for promissory estoppel) or acceptance (for implied contract) would not be satisfied at trial if solely based on the maybe and vague uncertainty of possible available seniority. Without this element there is no independent contract, the trial court would never even hypothetically get to the CBA. Accordingly, there could not possibly be a federal issue based

on the seniority provisions. Similarly, to the extent the respondents bantered about the term "seniority," the state claim would turn on whether the individual was left with the understanding that his job was secure or employment would otherwise be forthcoming. Again, there is no need to interpret the CBA as the understanding of the parties would control.

The lower court analyzed the seniority issue by analogy to the Caterpillar case. This analogy focused on how it anticipated the CBA could be used if the case went to trial. The impression created is that the court's analysis is merely speeding up what it anticipates is the inevitable preemption. Such analysis is shortsighted. First, to the extent that aspects of seniority provisions in the collective bargaining agreement may be used at trial to support a defense or bolster evidence of an element, "claims having their genesis in state law are not preempted merely because their resolution in part requires interpretation of a collective bargaining

agreement." Brown v. Holiday Station Stores, supra at 405. It is "not required that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims." Jones v. Roadway Express, supra at 1090. Lingle v. Norge Div. of Magic Chef, supra at 413, n.12. Second, to the extent that initial analysis might indicate possible preemption, examination of the federal purposes reveals they are furthered more by resolution of the state claims on the merits. This examination is set forth with petitioners' Second Question Presented for Review and, to the extent applicable, incorporated herein by reference to avoid redundancy.

V. FIFTH QUESTION FOR REVIEW:

The NLRA and LMRA does not protect outrageous conduct. Farmer v. Carpenters, supra at 301-302. Regardless of the setting, federal preemption will not override a state emotional distress claim which has as an element a requirement of outrageous conduct. Id. at 304-306. The Court correctly did not establish a national definition for "outrageousness." The determination of what constitutes outrageousness was left to the states with the only provision that "[u]nion discrimination in employment opportunities cannot itself form the underlying outrageous conduct on which the state tort action is based...something more is required." Id. at 305 (emphasis added). The Court never said that discrimination could not be considered.

The tort of emotional distress has evolved to reflect life's realities without causing disaster to the legal system. Ohio is in the mainstream that recognize, while employment discrimination in a

vacuum may not amount to outrageousness, it is a factor for consideration and, depending on the factual circumstances, may constitute the determinative factor. Uebelacker v. Cincon Systems, Inc. (1988), 48 Ohio App. 3d 268; Henteel v. Singer Co. (1986), 138 Cal. App. 3d 290 (discrimination following OSHA complaint); Carsner v. Freightline Corp. (Or 1984), 688 P.2d 398; Cagle v. Burns (S. Ct. Wa. 1986), 726 P.2d 434 (wrongful discharge in violation of public policy); Beasley v. Affd Hospital Prod. (Mo.1986), 713 So.2d 557. The exercise of power and authority " must be done in a permissible way and extreme and outrageous conduct may arise from abuse by the actor of a position, or a relation with the other, which may give him actual or apparent authority over the other or power to affect his interests." Uebelacker, supra (quoting Restatement of the Law 2d, Torts (1965), Section 46). Simply, "relatively immobile workers who often have no other place to go to market their skills do not stand on equal footing with large corporations

[and unions]....It is the abuse of power ...which aggravates the outrageousness." Milton v. Ill. Bell Tel. Co. (Ill. App. 1981), 427 N.E.2d 829, 832. The behavior cannot be viewed in a vacuum rather the combination, duration, frequency individual susceptibility and employee's ability to obtain internal redress are significant factors in determining outrageousness. See,. Rulon-Miller v. IBM (Cal. App.1985), 208 Cal. Rptr. 524, 534-535.

The Sixth Circuit removed from petitioners' case, any consideration of discrimination as a factor in outrageousness. The court first segregated the various behaviors, isolating them out of their context. First, the district court segregated and preempted petitioners' claims relating to "defendants failure to consider [their] rights and [also withheld] relevant information about the collective bargaining agreement". Adkins, supra at 21-22. In affirming, the Sixth Circuit stated: "the: claim goes to the quality of their union representation and the fairness of their

employer's labor practices, issues central to the concerns of federal labor law." Id. at 25. There was no further analysis. Thereupon the circuit overruled the district court's finding of no preemption for the portions of the complaint relating to emotional distress caused by "defendants conduct in denying Plaintiff the right to participate." Id. at 22. The circuit court's rationale was the conduct was not sufficient to constitute outrageousness. Id. at 25-26.

Petitioners challenge the circuit court on three points: First, the determination of outrageousness should not be piecemeal. The respondents' entire course of conduct should be considered if relevant. Second, the court should not have automatically preempted portions of the claim which may have a relation to the labor process. Closer examination would reveal only a peripheral relation to federal policies. Also, a LMRA action technically would not be concerned with the scope of conduct beyond the minimum needed to satisfy a violation and would not tailor

damages to all injuries sustained. Accordingly, relevant portions of petitioners' second question for review are incorporated by reference. Third, the circuit court should not have overruled the trial court and determined whether the conduct alleged in the complaint constituted outrageousness. Aside from its failure to analyze current state law, preemption was the issue before the court, not the underlying merits.

CONCLUSION:

For the foregoing reasons petitioners assert the Petition for Certiorari should be granted.

Respectfully Submitted,

Dwight D. Brannon
Counsel of Record
for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Petition for Certiorari has been served upon each of the following counsel for the respective respondents, GMC, IUE, and Local 801, by regular United States Mail this 13 day of January 1992 addressed to their respective following office addresses:

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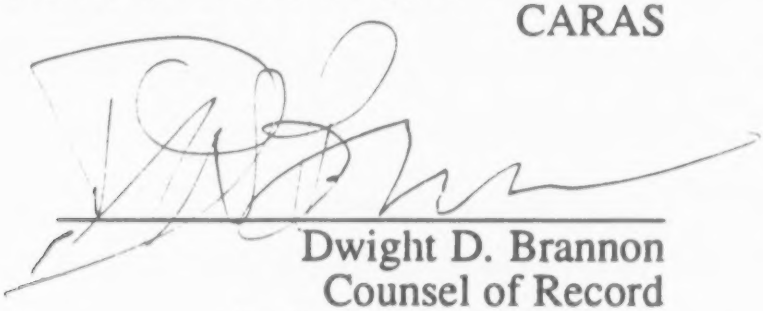

Dwight D. Brannon
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for Plaintiffs-Petitioners

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-3164/3234/3235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN J. ADKINS, et al.,
Plaintiffs-Appellants (90-3164)/
Cross-Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee/
Cross-Appellant (90-3234),

and

LOCAL 801; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE and FURNITURE WORKERS, AFL-CIO,
Defendants-Appellees/
Cross-Appellants (90-3235).

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed October 15, 1991

Before: MILBURN and BOGGS, Circuit Judges; and

DEMASCIO,* Senior District Judge.

BOGGS, Circuit Judge. Plaintiffs are a class of former employees of defendant General Motors Corporation (General Motors) and their spouses. Because the spouses' claims are derived from the employees' claims, we shall use the term "plaintiffs" to refer to the employees only, unless the facts and the law of this case require us to distinguish between the plaintiffs-employees and the plaintiffs-spouses.

At all times relevant to this dispute, the plaintiffs were members of defendant International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers and of defendant Local 801 of that union (collectively, "the union"). In a prior action in the United States District Court for the Southern District of Ohio, plaintiffs brought a hybrid unfair representation/unfair labor practices claim against General Motors and the union, pursuant to the Labor Management Relations Act (LMRA) § 301, 29 U.S.C. § 185, and the Labor- Management Reporting and Disclosure Act (LMRDA) § 101(a)(1), 29 U.S.C. § 411(a)(1). *See generally Adkins v. General Motors Corp.*, 556 F. Supp. 452 (S.D. Ohio 1983)(motion to dismiss); *Adkins v. General Motors Corp.*, 573 F. Supp. 1188 (S.D. Ohio 1983) (motion for summary judgment), *aff'd in part, remanded in part*, 769 F.2d 330 (6th Cir. 1985). In that case, plaintiffs alleged, in substance, that General Motors and the Union had colluded in negotiating a collective-bargaining agreement in order to abrogate the special seniority rights contained in a collective-bargaining agreement called the "bridge agreement." We will discuss the nature of this agreement and the plaintiffs' rights under it more fully later in this opinion.

In the same action, plaintiffs also pursued pendent state law claims for breach of contract, tortious interference

*The Honorable Robert E. DeMascio, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

with contract rights, intentional infliction of emotional distress, and loss of consortium. The federal labor law claim was dismissed with prejudice as untimely. The pendent state law claims were dismissed without prejudice, for lack of a substantial federal question to support the exercise of jurisdiction over state law claims.

After the dismissal, many of the same plaintiffs filed a complaint in state court alleging fraud, tortious interference with contract rights, and intentional infliction of emotional distress, thereby initiating the case now before this court on appeal. *See generally Adkins v. General Motors Corp.*, 578 F. Supp. 315 (S.D. Ohio 1984). The factual allegations of the complaint were substantially the same as those advanced in the federal suit. Defendants removed the case to federal district court, asserting that these claims were fully preempted by federal labor law. Plaintiffs then moved to remand the case. The court below ruled that since plaintiffs' fraud and misrepresentations claims were fully preempted by federal labor law, the case contained a federal question substantial enough to support the exercise of federal question jurisdiction. At the same time, the district court also gave the defendants twenty days to present proper motions for summary judgment on all claims. The court noted its previous disposition of plaintiffs' federal labor law claims, which it had dismissed as untimely, and the identity of the complaint filed in the previous action and this one.

After defendants moved for summary judgment pursuant to the suggestion of the district court, the court below held that the federally-preempted fraud and tortious interference claims were barred by the six-month statute of limitations of the National Labor Relations Act. *See* 29 U.S.C. § 160(b). *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72, 103 S. Ct. 2281, 2294 (1983). These claims were dismissed with prejudice.

With respect to plaintiffs' claims for emotional distress, the court ruled that some were preempted and others were

not preempted. Those preempted were dismissed with prejudice as time-barred. Those not preempted were remanded to state court, because the dismissal of the federally preempted claims had left the case without a substantial federal question. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966).

This timely appeal and cross-appeal follow the court's dismissal and remand. On appeal, plaintiffs contend that the district court erred in holding any of the claims preempted and in remanding the unpreempted emotional distress claim. On cross-appeal, defendants argue that the court erred in holding that some of plaintiffs' emotional distress claims were not preeempted and in failing to dismiss all these claims with prejudice as time-barred under federal labor law.

We affirm the district court's judgment in so far as it holds plaintiffs' claims completely preempted and therewith barred as untimely by applicable federal labor law. We vacate the judgment below in so far as it holds that plaintiffs' emotional distress claims are not completely preempted and remands them to state court. We remand the case to the district court with instructions to dismiss all of plaintiffs' emotional distress claims with prejudice as completely preempted and time-barred under federal labor law.

I

Before the events giving rise to this case occurred, plaintiffs were employed by the Frigidaire Division of General Motors at its Dayton-area plant. They were paid at the wage rates prevailing in the automotive industry instead of the lower wages of the appliance industry. General Motors wanted to pay its Frigidaire employees at the lower rates and, to this end, it negotiated a new agreement with the local in 1976. As the *quid* for this *quo*, General Motors agreed that Frigidaire workers could transfer to the nearby Delco plant, also owned by General Motors and organized by the local, where automotive

workers' rates prevailed. The agreement granting the plaintiffs these rights, called the "bridge agreement" by the parties, provided that if there were lay-offs at Delco, Frigidaire workers who had transferred there could return to Frigidaire, where they would replace workers with less seniority. Plaintiffs took advantage of the "bridge agreement" and transferred from the Frigidaire plant to the Delco plant. The Delco plant later became a part of the Harrison Radiator Division of General Motors, but for purposes of simplicity we shall continue to refer to it as the Delco plant.

In 1979, General Motors sold its Frigidaire Division to White Motors, but retained possession of the physical plant at Dayton. General Motors planned to convert the facility and use it as part of its Chevrolet Division. All the workers were laid off as a result. The local then entered into negotiations with General Motors in order to secure employment for its laid-off members when the plant re-opened and to maintain its own position as their bargaining agent. General Motors agreed to rehire its laid-off employees and to recognize the union, but in the ensuing collective-bargaining agreement, the "bridge agreement" was abrogated. The resulting agreement was ratified by workers from the former Frigidaire plant and by the former Frigidaire workers who had transferred to Delco. The latter group included the plaintiffs. At the time of ratification, workers at the Delco plant were experiencing full employment, while workers at the Frigidaire plant were being laid off. As the year progressed, however, the situation was reversed. Workers at the Delco plant were laid off, including the plaintiffs. When they tried to retreat to the former Frigidaire plant, now part of Chevrolet, they learned that the "bridge agreement" had been abrogated.

The substance of plaintiffs' grievance, both in the preceding case and in this one, is that they were not told that the new collective-bargaining agreement terminated their retreat rights and that the union president told them many times prior to ratification of the new collective

bargaining agreement and afterwards that their "bridge agreement" rights would not be affected by the new arrangement. Plaintiffs argue that these representations were fraudulent and wrongly induced them to ratify an agreement not in their interest. Plaintiffs assert that the motivation for this alleged fraud was collusion between the local and General Motors, whereby the union agreed to the termination of plaintiffs' rights in exchange for General Motors's recognition of the local as the representative of the workers at the new Chevrolet plant. According to plaintiffs, this collusion constitutes common law fraud under state law. Plaintiffs also argue that the local president's post-ratification assurances about the survival of their rights have created a contract, which defendants have violated by refusing to honor their "bridge agreement" rights. Finally, the plaintiffs take the position that by their conduct in negotiating and implementing the new collective-bargaining agreement, defendants negligently[1] or intentionally inflicted severe emotional distress on them and their spouses.

II

The district court's well-reasoned opinion in response to plaintiffs' motion to remand and defendants' motion for summary judgment began by considering when claims apparently arising under state law are preempted by federal labor law. In the last decade, the Supreme Court has handed down four significant opinions on that question: 1) *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904 (1985); 2) *International Brotherhood of Electrical Workers, A.F.L.-C.I.O. v.*

[1]The wrongdoing that plaintiffs ascribe to defendants is all intentional: *intentionally* misrepresenting the 1979 CBA; tortiously, *i.e.*, *intentionally*, interfering with contract rights; and acting outrageously, *i.e.*, *intentionally*, to cause them emotional distress. None of the cases cited in their brief refers to the negligent infliction of emotional distress. We have no choice but to treat plaintiffs' claims for the negligent infliction of emotional distress as pleading boilerplate, since plaintiffs do not specify the nature of the negligence, as opposed to the intentional conduct, on the part of the defendants that caused the plaintiffs emotional distress.

Hechler, 481 U.S. 851, 107 S. Ct. 2161 (1987); 3) *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425 (1987); and, 4) *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877 (1988). After reviewing these cases, the district court held that a claim made by the plaintiffs under state law would be fully preempted by federal labor law if it arose from or required the interpretation of any of the collective-bargaining agreements relevant to the case. *See Lingle*, 486 U.S. at 405-06, 107 S. Ct. at 1881 ("Thus *Lueck* faithfully applied the principle of [LMRA] § 301 preemption . . . : if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute."); *Williams*, 482 U.S. at 395, 107 S. Ct. at 2431 ("[For preemption purposes, s]ection 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' *Electrical Workers v. Hechler*, 481 U.S. at 859 n.3, 107 S. Ct. at 2166-67 n.3 ....").

After reviewing plaintiffs' allegations of fraud under this standard, the district court concluded that "virtually every fraudulent representation allegedly made by [d]efendants relates in one way or another to the terms of the various collective-bargaining agreements." For that reason, the court held that plaintiffs' claim for fraud under state law was "substantially dependent" on the terms of the collective-bargaining agreement and therewith preempted by federal labor law.

To reach this conclusion, the court below was obliged to sift through the complaint in order to detect the factual allegations underlying its claim for relief from fraud. This was not easy work. The complaint is very difficult to understand. It is prolix and vague. Because of this

problem, we find it necessary to quote more extensively from the plaintiffs' pleadings and the opinion of the court below than we normally do.[2] The following passage from the court's opinion exemplifies the approach the court took to the task of defining plaintiffs' claims.

> [In their motion in opposition to summary judgment,] "Plaintiffs claim that the Unions misrepresented GM's position in 1979 contract negotiations and thereby induced them to enter into the agreements." . . . Plaintiffs specifically assert that "GM, IUE and 801 concerted[,] presented, urged and proposed . . . [the] agreements and modifications [of February 23, 1979] in a manner designed to insure their adoption through the permitted withholding of information necessary to meaningfully inform [the plaintiffs] that their 'bridge agreement' rights would be impaired by an affirmative ratification." Plaintiffs further allege that "[i]n furtherance of . . . [the] concerted plan

---

[2]In their brief and at oral argument, the plaintiffs allude to additional conduct by the president of Local 801 and other parties to this case, not mentioned in their complaint, which they maintain would support their claims of fraud and contractual obligations arising outside the context of collective bargaining agreement. They argue that the court erred in preventing them from proving this additional conduct by granting summary judgment in favor of the defendants. Even if we were inclined to indulge this argument because of the mandate of the Federal Rules that a complaint is to be construed liberally, *see* FED. R. CIV. P. 1, our forbearance would not aid the plaintiffs. The court below disposed of the case on a motion for summary judgment. In opposing such a motion, plaintiffs were under a duty not only to state the allegation they intended to prove at trial but also to demonstrate the nature and quality of the evidence they had at their disposal. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986) ("[T]he plain language of Rule 56(c) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2514 (1986) ("The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.").

> of GM, IUE and 801 to . . . substantially confine any consideration of . . . [the] modifications, GM, IUE and 801 concertedly confined the scope of any circulated information regarding the proposals to the explanation and discussion of only the benefits to be derived by the persons then employed by Frigidaire[,] while wholly ignoring and being totally silent with respect to any consequent converse detriment whatsoever to [the plaintiffs]." . . . *While not* every *claim of fraudulent misrepresentation would be preempted by § 301, based on the foregoing allegations, the Court concludes that the* Plaintiffs' *claims of fraudulent misrepresentation* are *in fact preempted by § 301.*
>
> *It cannot be disputed that Plaintiffs' claims of fraudulent misrepresentation all relate to the various collective bargaining agreements. It would be impossible to determine whether the information provided to Plaintiffs by Defendants was false (or insufficient) without analyzing the terms of the various collective bargaining agreements.*

J.A. 116-17. (Italics supplied.) (Citations omitted.)

In considering plaintiffs' tortious interference claim, the court also held that they were fully preempted, because adjudicating any of them would require an analysis of plaintiffs' rights under the collective-bargaining agreements. The following excerpts from the district court's opinion exemplify the approach the court took to these claims and their supporting allegations of fact.

> In Count Three of their Complaint, Plaintiffs assert that "[a]s a proximate result of the conduct of the defendant IUE, the defendant Local 801 breached its duties and agreements with the plaintiffs." Plaintiffs further assert that "[a]s a proximate result of the conduct of the defendant unions, the defendant General Motors did breach

its expressed and implied agreements with the plaintiffs." Finally, Plaintiffs assert that "[a]s a proximate result of the conduct of the defendant General Motors, the defendant unions did breach their contracts, fiduciary duties and business relationships with said plaintiffs." . . .

* * *

Defendant Local [801] allegedly breached its fiduciary relationship by promoting changes in Plaintiffs' collective bargaining agreement which were allegedly detrimental to Plaintiffs and by allegedly concealing the fact that said changes were in fact detrimental. *An analysis of whether or not Defendant Local 801 breached its duty of fair representation requires an analysis of the terms of the collective bargaining agreements. Without such an analysis, it would be impossible to determine the impact of the Defendant Local 801's actions upon the Plaintiffs.*

* * *

Further, [with respect to the contention that the local and the union induced General Motors to breach its duties toward the plaintiffs,] it must be remembered that Plaintiffs' chief complaint is that GM modified the terms of the collective bargaining agreements. Even assuming, *arguendo*, that some implied agreement, separate and apart from the collective bargaining agreements, existed between Plaintiffs and Defendant GM, *it would be impossible to determine whether said agreement was breached by the modification of the terms of the collective bargaining agreements without analyzing and interpreting the terms of the collective bargaining agreements.*

* * *

> Finally, [with respect to plaintiffs' claim that GM induced the local and the union to breach its duties toward the plaintiffs,] Plaintiffs basically assert that the Defendant Unions' actions in promoting the modification of the collective bargaining agreements breached Defendant Unions' duty of fair representation. *The propriety of Defendants' actions simply cannot be determined in the absence of an analysis of the terms of the collective bargaining agreements before and after the modification of February 23, 1979.*

J.A. 118-22. (Emphasis supplied.) (Citations omitted.)

III

A

Plaintiffs rely largely on *Caterpillar, Inc. v. Williams*, *supra*, to argue against the district court's disposition of their fraud and tortious interference claims. Because of the use plaintiffs make of the case, we begin our consideration of plaintiffs' arguments with a review of its facts and holdings.

In *Caterpillar*, plaintiffs were a group of long-time employees of the Caterpillar Corporation at its San Leandro, California plant. They hired in as hourly workers under terms established by a collective-bargaining agreement with United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Later during their employment with Caterpillar, they were promoted to the salaried ranks. While in those jobs, plaintiffs were told that the company would always take care of them and that if the San Leandro plant ever closed, plaintiffs would be given jobs in other divisions or subsidiaries of Caterpillar's enterprises. Later still in their employment at San Leandro, plaintiffs were returned to their former positions as hourly employees. While they were in those positions, the company decided to close the San Leandro plant. Plaintiffs were notified that they were

laid off and that promises to find employment for them elsewhere would not be honored.

Plaintiffs then brought suit in state court, alleging that Caterpillar's promises of continuing employment were contractual obligations under state law and independent of any collective-bargaining agreement between the UAW and Caterpillar. Caterpillar removed the action to federal court, contending that, as a matter of law, any rights plaintiffs might have because of contracts under state law were merged into the collective-bargaining agreement. Because of this merger, Caterpillar alleged, plaintiffs' state law claims were fully preempted by federal labor law.

The Supreme Court disagreed and held that removal was improper under the "well-pleaded complaint rule" of federal question jurisdiction. 482 U.S. at 391-93, 398-99, 107 S. Ct. at 2429-30, 2432-33. This rule provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." 482 U.S. at 392, 107 S. Ct. at 2429. In addition, the rule provides that "a case may not be removed to federal court on the basis of a federal defense . . . , even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. 482 U.S. at 393, 107 S. Ct. at 2430.

Normally, federal preemption is a defense to a state law claim and may not serve as the basis for removal. 482 U.S. at 392, 107 S. Ct. at 2430. The doctrine of "complete preemption," however, is a corollary to the "well-pleaded complaint rule." 482 U.S. at 393, 107 S. Ct. at 2430. Once an area of state law has been completely preempted, any claim purportedly based on the preempted state law is considered a federal claim from its inception. *Ibid.* Complete preemption occurs when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-

pleaded complaint rule.'" *Ibid.* (*quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 1547 (1987)). The complete preemption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims preempted by LMRA § 301. *Ibid.* The preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. 482 U.S. at 394, 107 S. Ct. at 2430 (citing *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23, 103 S. Ct. 2841, 2853-54 (1983)). Section 301 preemption governs claims either founded directly on rights created by collective-bargaining agreements or "substantially dependent on analysis of a collective-bargaining agreement." 482 U.S. at 394, 107 S. Ct. at 2431 (citing *Electrical Workers v. Heckler*, *supra*).

Despite the strength of § 301 preemption, the *Caterpillar* court held that plaintiffs' state law contract claims were not completely preempted so as to justify removal to federal district court. *Ibid.* The court reasoned that Caterpillar's promises to the plaintiffs, if proven, constituted an employment contract with the plaintiffs individually, separate from the collective-bargaining agreement, that was not necessarily superseded by the collective-bargaining agreement between Caterpillar and the UAW. 482 U.S. at 396, 107 S. Ct. at 2431. In other words, "[the *Caterpillar* plaintiffs'] complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement." 482 U.S. at 395, 107 S. Ct. at 2431.

This holding did not preclude the possibility that the *Caterpillar* plaintiffs' claims were *partially* preempted. In other words, the defendant employer might successfully raise federal preemption as a defense to the plaintiffs' state law contract claim if it is able to show that enforcing

the alleged contracts would violate federal labor laws. *See* 482 U.S. at 397, 107 S. Ct. at 2432. For example, Caterpillar might successfully defend by showing that the purported contracts with the individual plaintiffs violated the principle of exclusive representation of the National Labor Relations Act § 9(a), 29 U.S.C. § 159(a). *Ibid.* Nonetheless, "the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule . . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law . . . ." 482 U.S. at 396, 107 S. Ct. at 2433.

On the strength of *Caterpillar*, plaintiffs in this case argue that the district court erred by giving full preemptive effect to defendants' "defensive allegations" when it considered plaintiffs' claims of fraud. With respect to their claims of tortious interference, plaintiffs argue that the district court erred by not holding that their contract claims arose outside the context of the collective bargaining agreement. Neither argument has merit.

B

Plaintiffs misconstrue the district court's opinion when they argue that the court mistakenly treated defendants' assertion of federal preemption as an affirmative defense to fraud. Rather, the district court relied solely on the allegations on the face of the complaint to determine that all of plaintiffs' claims of fraud were fully preempted. An examination of the passages from the district court's opinion quoted above should make that point clear. The plaintiffs' claim, as the court understood it, was that the president of Local 801 had fraudulently induced them to ratify the 1979 collective-bargaining agreement that abrogated the "bridge agreement." As the court below correctly noted, under Ohio law, damages are a necessary element of a claim for fraud. *Cohen v. Lamko, Inc.*, 10 Ohio St. 3d 167,169, 462 N.E.2d 407, 409 (1984). The

damage alleged by plaintiffs was the loss of "bridge agreement" entitlements, which had been effected by the 1979 collective-bargaining agreement. In order to adjudicate this claim, the court below would have been obliged, at a minimum, to determine that the "bridge agreement" conferred such rights on the plaintiffs, that the subsequent collective-bargaining agreement abrogated those rights, and that the plaintiffs agreed to the 1979 collective-bargaining agreement because the president of Local 801 misrepresented those rights as the court construed them. As the court below correctly concluded, such a judicial undertaking would necessarily involve the federal courts in adjudicating a claim "substantially dependent on analysis of collective-bargaining agreements." *Caterpillar*, 482 U.S. at 394, 107 S. Ct. at 2431; *Electrical Workers*, 481 U.S. at 859 n.3, 107 S. Ct. at 2166-67 n.3. We might go even farther and say that the rights at issue are "created by collective-bargaining agreements," *Caterpillar, ibid.*, thus effecting a complete preemption of plaintiffs' fraud claims.

Plaintiffs also argue that the court did not consider all of their allegations of fraud in concluding that their claim was fully preempted. Their brief states:

> As set forth in paragraphs 39 through 42 [of the complaint], the Plaintiffs-Appellants further alleged, after completion of all collective bargaining agreements, and after all the actions surrounding the collective bargaining agreements, that the President of Local 801 from February of 1980 through January of 1981, made various extensive fraudulent misrepresentations regarding the continued recognition of the seniority rights of the laid off Plaintiffs-Appellants. Specifically he indicated that these employees had nothing to worry about, and they accordingly would participate fully in the Chevrolet jobs. . . .
>
> These fraudulent representations made by the President obviously took place long after the

> collective bargaining agreements, and they were not representations being made with regards to the collective bargaining agreements, but were representations that the Plaintiffs-Appellants would be participating in the Chevrolet jobs like their counterparts.
>
> * * *
>
> In the case at bar, the fraudulent representation claims are based upon the representations made by the President; the claim does not require extensive interpretation of the collective bargaining agreement. Instead, the Plaintiffs-Appellants, in raising their separate state claims, complain with regards to the fraudulent acts on the part of the President in making representations that seniority, despite the terms and conditions of the collective bargaining agreement, was going to be respected.

Brief for the Appellants at 20-21, 22-23.

Plaintiffs' position in the passages just quoted from their brief is not very clear. We do not know whether they are alleging that the president of Local 801 told them that the 1979 collective-bargaining agreement did not affect their rights under the "bridge agreement," or whether they are alleging that the president of Local 801 told them that their purported entitlement to jobs at the Chevrolet plant would be respected, despite the 1979 collective-bargaining agreement. What is clear is that plaintiffs maintain that these representations occurred independently of the collective bargaining agreement and that, as a result, they give rise to claims not completely preempted by federal law.

Under either understanding of the meaning of plaintiffs' complaint, this argument is without merit. We assume first, for the sake of argument, that plaintiffs are asserting that after the 1979 collective-bargaining agreement had been negotiated and ratified, the president of Local 801

concealed from the plaintiffs that it abrogated their "bridge agreement" rights. The fact that these alleged misrepresentations took place outside the context of collective bargaining is immaterial. The critical inquiry is whether a court adjudicating this claim must determine rights arising under a collective bargaining agreement. It surely must, if plaintiffs are alleging that the president of Local 801 concealed from them the fact of their loss of "bridge agreement" rights.

In order to find fraud under Ohio law, a court must find, among other things, that there is a misrepresentation or concealment of fact material to the transaction, that the party against whom fraud is alleged knew of the falsity of his misrepresentation or was so indifferent to truth or falsity that knowledge may be inferred, and that the misrepresentations were made with the intent of inducing the other party to rely on it to his detriment. *Cohen*, *supra*. In order to make such a determination in this case, the court would have to ascertain what the plaintiffs' rights were under the bridge agreement; whether they had been abrogated under the 1979 collective-bargaining agreement; what the Local's president had told plaintiffs about the 1979 collective-bargaining agreement; whether or not it was false, given the court's construction of the agreements at issue; and whether the Local president knew or should have known of its falsity. These determinations require an analysis of both the "bridge agreement" and the 1979 collective-bargaining agreement. The analysis may not be especially difficult, but it would be extensive. Plaintiffs' fraud claims, on this understanding of their complaint, are so intertwined with the terms of the collective-bargaining agreements present in the case that they may not be separated. *See Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S. Ct. at 1912.

We next assume that plaintiffs are instead alleging that the president of Local 801 told them that their "seniority rights" would be respected, despite the terms of the 1979 collective-bargaining agreement abrogating their "bridge agreement" rights. We can conceive of no understanding

of the term "seniority rights" in this case other than the plaintiffs' asserted rights to transfer from the Delco plant to the Chevrolet plant (formerly the Frigidaire plant), carrying their job seniority with them. As we understand the facts of this case, this portable seniority is the basis of plaintiffs' asserted entitlement to share in jobs at the Chevrolet plant. These rights were created by the "bridge agreement," one of the collective-bargaining agreements of this case. Under the construction of plaintiffs' allegations that we are considering here, adjudication of plaintiffs' claim would require, at the minimum, a determination of what plaintiffs' "bridge agreement" rights were and whether they are being violated by the new arrangements. Again, the analysis may not be difficult, but it is extensive.

We conclude that the district court did not err in holding all of plaintiffs' fraud claims completely preempted by federal labor law. We find such a result completely consistent with federal labor law policy. Indeed, it is required by it. The parties do not dispute that both Local 801 and General Motors intended that the 1979 collective-bargaining agreement terminate the "bridge agreement." Plaintiffs, in effect, are asking this court to find that the rights thus terminated were reborn under state law because of the inequitable conduct of General Motors and union officials when the 1979 collective bargaining agreement was submitted for member ratification and at various times thereafter. We are asked to enforce those rights either by awarding money judgments for their violation or by injunction. We would thereby create a situation in which rights extinguished under federal labor law were vital under state law. The purpose of the doctrine of complete preemption is to prevent one set of rights and obligations from issuing from a collective-bargaining agreement under federal law while contradictory rights and obligations flowed from state law. If plaintiffs have been betrayed by their employer and their union and cheated out of valuable seniority rights in a fraudulent ratification procedure, their remedy is a timely suit for unfair representation/unfair

labor practices. Plaintiffs cannot be permitted to revive rights deemed extinguished under federal labor law by relying on state common law.

C

We now turn to plaintiffs' tortious interference claims. Plaintiffs rely on *Caterpillar* to argue that contractual obligations between employer, employee, and union may exist outside the collective-bargaining agreement. They fault the district court for failing to consider this possibility in addressing their tortious interference claims. As we understand the plaintiffs' position, they are arguing that a contract was formed because of the representation of the president of Local 801 and others that their "bridge agreement" rights either had not been abrogated, or would be respected, despite abrogation. They analogize this purported contract to the promises made to the *Caterpillar* plaintiffs about continuing employment with the company. On the basis of this analogy, they assert that the contractual rights arising from the representations of the local president and others can be determined without reference to the collective-bargaining agreements present in the case. Hence they maintain that removal on the basis of complete preemption was improper.

We do not accept this analogy. In *Caterpillar*, the alleged contract between the plaintiffs and the employees was independent of any collective-bargaining agreement; in this case, the purported contracts between the plaintiffs, on the one hand, and their union and their employer, on the other, are not independent in any way of the collective-bargaining agreements in the case. A comparison between *Caterpillar* and this case should make the point clear.

In order to adjudicate the *Caterpillar* plaintiffs' state law contract claim, a court would be obliged to engage in ordinary contract analysis. It would be required to determine questions such as whether Caterpillar had offered the plaintiffs continuing employment, whether the

plaintiffs had accepted the offer by performance or otherwise, and whether there was adequate consideration for the promises. Although these determinations could be made without any reference whatsoever to a collective-bargaining agreement, once it had been established that such a state law contract existed, the defendant company would be permitted to argue, for example, that subsequent collective-bargaining agreements had displaced this contract because of the exclusive representation provisions of the National Labor Relations Act. Such an argument would raise preemption as a defense to the assertion of contractual obligations that had been established without reference to a collective-bargaining agreement, but it would not serve as the basis of removal.

In this case, in order to adjudicate plaintiffs' claim that a contract existed under state law, the court would have to determine that plaintiffs were offered "seniority rights" based on the "bridge agreement" after the 1979 collective-bargaining agreement, that they accepted the offer, that there was consideration, and so on. Or the court may have had to determine that plaintiffs were induced to believe that their asserted "seniority rights" under the "bridge agreement" were intact or would be respected, even if not intact, and that they relied on these representation justifiably and to their detriment. An exercise such as this necessarily involves the court in determining what the "seniority rights" under the "bridge agreement" are. It follows that adjudicating the plaintiffs' tortious interference clam necessarily involves an analysis of a collective-bargaining agreement because the contractual relation necessary to the claim is based on the representations of the president of local 801 that their "seniority rights" would continue. For this reason, plaintiffs' tortious interference claims are fully preempted. The court below did not err in so holding.

IV

We now reach plaintiffs' emotional distress claims. The district court held some of these claims completely preempted, others not completely preempted. In the opinion of the district court, plaintiffs' claims were completely preempted if they were alleging that General Motors and the union caused them emotional distress by the very fact of actions such as withholding information about the 1979 collective-bargaining agreement; by concealing the fact that a vote was to be held; by insisting on quick ratification of the agreement; or by failing to consider their "bridge agreement" rights. On the other hand, the court concluded that plaintiffs' emotional distress claims were not preempted in so far as they were based on the defendants' conduct in doing these things.

Ohio law requires that a defendant's conduct be "extreme and outrageous" if there is to be tort liability for a plaintiff's emotional distress. *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 382, 453 N.E.2d 666, 671 (1983). The following passages from the district court's opinion exemplify its approach to the claims of emotional distress under Ohio law in this case.

> In ¶ 25 of their Complaint, Plaintiffs assert that Defendant GM, Defendant IUE and Defendant Local 801 "proposed modifications of the Local Seniority Agreement of Dec. 10, 1976 and of the Bridge Agreement of December 10, 1976, together with the urging that the same be adopted." *If the Plaintiffs are claiming that in proposing this modification, Defendants caused Plaintiffs' emotional distress, the Court concludes that said claim is preempted by § 301 of the LMRA. Such a claim is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]."* Allis-Chalmers Corp., 471 U.S. 213. . . .
>
> If the Plaintiffs are claiming that the Defendants'

> failure to consider the rights of Plaintiffs caused Plaintiffs emotional distress, the Court concludes that said claim is preempted [by federal labor law] for said claim is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* at 213.
>
> If the Plaintiffs are claiming that [by withholding relevant information about the collective bargaining agreement,] Defendants caused Plaintiffs emotional distress, the Court concludes that said claim must be preempted . . . as the evaluation of such a claim "is inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.*
>
> If the Plaintiffs are claiming that Defendants' alleged conduct in concealing *the fact* that a vote was to be held caused the Plaintiffs emotional distress, the Court concludes that said claim is *not* preempted by § 301 of the LMRA. Regardless of whether the proposed changes to the collective bargaining agreements would have a major or minor effect upon Plaintiffs, it could be argued that Defendants' alleged conduct in denying Plaintiffs the *right to participate in decision making* caused Plaintiffs emotional distress.

J.A. 123-26. (Italics supplied.)

Plaintiffs rely on *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 97 S. Ct. 1056 (1977) to uphold the judgment of the court below that some of their emotional distress claims are not completely preempted. They also rely on *Farmer* to argue that the court erred in holding that other emotional distress claims were fully preempted. This reliance is misplaced.

In *Farmer*, the plaintiff, a vice-president of a local union, developed sharp differences with other officers of

the local over union policies. The local ran a closed hiring hall. Plaintiff alleged that as a result of his policy disagreement with the leadership of the local, he was discriminated against when jobs were assigned at the hiring hall. He also alleged that he was subjected to a campaign of vituperation and harassment when he came to the union hall. He filed suit in California state court, alleging that union officials had intentionally engaged in outrageous conduct causing him severe emotional distress. In the same action, he also alleged that the local officials' discrimination against him breached the relevant collective-bargaining agreement and his membership contract with the union. The state court dismissed his discrimination and breach of contract claims as completely preempted, but allowed his emotional distress claim to go to the jury. The case ultimately came to the Supreme Court, which upheld the state trial court's exercise of jurisdiction over the emotional distress claims.

The premise of the court's reasoning was that the complete preemption doctrine should not be applied in cases where "the State . . . has a substantial interest in protecting its citizens" from tortious conduct, 400 U.S. at 302, 97 S. Ct. at 1064, or where the activity at issue is merely peripheral to the concerns of federal labor law, 400 U.S. at 297, 97 S. Ct. at 1061. On the other hand, "[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between the power asserted by Congress and the requirements imposed by state law. 400 U.S. at 296, 97 S. Ct. at 1061.

Applying these consideration to the case before it, the Supreme Court held:

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of . . . . Regardless of whether the operation of the hiring hall was unlawful or lawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so

> outrageous that "no reasonable man in civilized society should be expected to endure it." . . .
>
> The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse [complained of]. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury . . . or damage to reputation.
>
> * * *
>
> On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. [Neither] union discrimination in employment opportunities nor [threats of discrimination can in themselves] form the underlying "outrageous" conduct on which the state-court action is based . . . . [S]omething more is required . . . . [I]t is essential that the state tort be either unrelated to the employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.
>
> Two further limitations deserve emphasis. Our decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.

400 U.S. at 302, 305-06, 97 S. Ct. at 1064, 1066.

Although the court below did not express itself in these terms, its decision can be understood as analogizing the fact of withholding information about the 1979 collective bargaining agreement in this case to the hiring discrimination alleged in *Farmer*. The decision can also be understood as analogizing the manner in which the information was withheld in this case to the manner in which the plaintiff in *Farmer* was abused. The analogies appear to establish the boundary between the central concerns of federal labor policy and the unpreempted interests of state law in protecting its citizens. In this case, the line divides the claim that information was allegedly withheld from the claim that it was withheld in an abusive manner.

We are unpersuaded that the line has been drawn correctly, appealing though the distinctions of the court below are on first inspection. Although it is theoretically possible that union leaders urging the ratification of a collective-bargaining agreement *might* behave outrageously toward other union members, no outrageous conduct has been alleged in this case. The substance of plaintiffs' complaint is that material information about the 1979 collective-bargaining agreement was withheld from them. This claim goes to the quality of their union representation and the fairness of their employer's labor practices, issues central to the concerns of federal labor law. Without specific allegations of outrageous conduct on the part of the union or the employer in securing the ratification of the 1979 collective-bargaining agreement, we find the state interest in adjudicating plaintiffs' emotional distress claims too insubstantial to defeat complete preemption.

Accordingly, we affirm the district court's holding that plaintiffs' emotional distress claims, in so far as plaintiffs allege that information was withheld from them, are completely preempted. We reverse the district court's holding that plaintiffs' emotional distress claims, in so far

as they refer to defendants' conduct, are not completely preempted.

V

For the reasons given above, the district court's dismissal of plaintiffs' complaint is **AFFIRMED**. The court's remand of plaintiffs' emotional distress claims to state court is **VACATED**. The case is **REMANDED** with instructions to **DISMISS** the complaint **WITH PREJUDICE** in its entirety.

APPENDIX B

NAMES OF PETITIONERS (817):

1) John J. Adkins;2) Alva L Alexander, Jr.;3) Jerry L. Alexander; 4) Robert L. Alexander; 5) Melville G. Allemang; 6) Dewey Alley; 7) Donald Anderson; 8) Richard Andruskewicz; 9) Paul L Arahood; 10) Patricia A. Arnett; 11) Paul Douglas Arrington; 12) C. Douglas Astor; 13) Larry Allan Austin; 14) Charles E. Bach; 15 Lester Payne Backus; 16) Barry L. Bahns; 17) John R. Bailey; 18) Lester Bair; 19) Herman L Baker; 20) Walter C. Baker; 21) James L Barnes; 22) Harry Bausmith; 23) Henry A. Beasly; 24) Janet E. Stivers Beckett; 25) Larry L. Belue; 26) Thomas F. Bledsoe; 27) Paul E. Boggs; 28) Robert L. Bowling, Sr.; 29) Raleigh L. Brewer; 30) Robert Brock; 31) Darryl Patrick Brown; 32) Michael R. Brown; 33) Roger D. Brown; 34) Ross T. Brown; 35) Larry Burile; 36) Wendell C. Burr; 37) Darrell H. Burton; 38) Larry J. Camp; 39) Glenn Campbell; 40) Terry Carman; 41) Lory Carpenter; 42) Billey Ray Carr; 43) Tommy Roger Cavey; 44) Thelma K. Chain

45) Donalfd F. Chambers; 46) Edith C. Chandler; 47) Eddie Childers, Sr.; 48) William F. Clark; 49) Benjamin D. Cleary; 50) Homer Climons; 51) Lester Collins; 52) Herman Combs; 53) James C. Combs; 54) Phiilip E. Combs; 55) Roger K. Combs; 56) Cecil W. Conrald;. 57) Terry L. Conway; 58) Denver Cook; 59) Alfred Cooper; 60) James A. Cooper; 61) Bruce W. Cordray; 62) Curt Couch; 63) Joseph M. Courter; 64) Charles W. Cowens; 65) Larry D. Cox; 66) Harry Crego; 67) Sammy Crouch; 68) Harold L. Cundif; 69) Douglas E. Curtis; 70) John E. Dales; 71) Thomas M. Dalton; 72) James Darst; 73) Gary L. Davidson; 74) Richard C. Davidson; 75) Robert M. Davidson; 76) Dean A. Davis; 77) Gary H. Day; 78) John E. Deak; 79) Michael W. Deck; 80) jhn A. Denman; 81) Robert Dennison; 82) James D. Dillow; 83) Lloyd D. Eaton, Jr.; 84) Larry E. Edington; 85) Donald Ellinger; 86) David B. Evans; 87) Eddie R. Evans; 88) LaVaughn Farris; 89) Michael V. Finley; 90) Dennis B. Forsyth; 91) Robert C. Freeman;

92) Harold French; 93) Lloyd E. Gebbard; 94) Richard Garberson; 95) Howard E. Gardner; 96) Floyd A. Garrod, Jr.; 95) Larry Garwood; 93) Bernard L. George; 99) William C. Gibson; 100) Donald D. Gilbert; 101) Harry E. Gisewite; 102) William Glenn; 103) Otis J. Glover; 104) Thomas R. Goins; 105) Mac S. Green; 106) Leonard H. Griffen; 107) Stanley D. Griffith; 108) Marvin D. Grooms; 109) Williams R. Grooms; 110) Kenneth D. Gropengieser; 111) James A. Grosshart; 112) Donald G. Gulasa; 113) George Gurdon; 114) Howard Guy, Jr.; 115) Forrest B. Gwinn; 116) Ronnie L Hall; 117 Danny R. Hamm; 118) John Hamm; 119) Ronald e. Hampton; 120) Donald E. Hardy; 121) Dennie M. Hardyman; 122) David Lee Hargrove; 123) Stephen A. Harlow; 124) John Harowski, Jr.; 125) James D. Harris; 126) Ronald L. Hartbarger; 127) Delbert Hatton; 128) Joseph Haynes; 129) Wilson D. Helfinstine; 130) George C. Helton; 131) Gary Hemberger; 132) Jerry W. Henderson; 133) Lovell Henderson;

134) Roger S. Henderson, Sr.; 135) John D. Hendricks; 136) LeRoy R. Herdman; 137) Glen E. Higgins; 138) Leslie Higgins; 139 Cletus Holbert; 140 Gary A. Holliday; 141) James C. Hosey; 142) Jack R. Howard, Sr.; 143) Carl W. Hudson; 144) Bruce A. Hughley, Sr.; 145) Richard J. Hunter; 146) Norman E. Hurst; 147) James Ishman, Sr.; 148) Bradley A. Ivey; 149) Charles H. Jackson; 150) Robert Jackson; 151) Thaddeus S. Jackson; 152) Alfred R. Jamison; 153) James M. Jellison; 154) David Jends; 155) Fred A. Jennings; 156) Bobby Gene Johnson; 157) James L Johnson; 158) Leonard D. Johnson; 159) Richard E. Johnston; 160) Jerry G. Jones; 161) John A. Jones; 162) Lonnie L Kilburn; 163) Sylvester Kindred; 164) Larry W. King; 165) Gerd Klingler; 166) John Knight; 167) Donald D. Konz; 168) John E. Laird; 169) Gary P. Layne; 170) Charles David Leadingham; 171) Edward J. Leary; 172) Frank G. Lee; 173) Norman D. Lee; 174) Timothy L Leonard; 175) Ronald Leopold; 176) Stephen M. Lett;

177) Lester D. Leturgez; 178) John E. Lewis, Jr.; 179) Ronnie J. Lewis; 180) Charles E. Lilly; 181) C.M. Loesch; 182) Robert Lofty; 183) Thomas K. Lngenecker; 184) Glenn M. Lykins; 185) Richard McCarty; 186) Thomas J. McGarvey; 187) Franklin B. McIlvain; 188) Robert G. McIntosh; 189) Emery Myles McMahan; 190) Harrison Madden, Jr.; 191) Ronald E. Malone; 192) Marion Marshall; 193) Mary A. Marshall; 194) Michale L. Massis; 195) David L. Meadows; 196) George Michael Mercer; 197) James L. Merkison; 198) Gordon L. Merritt; 199) Richard Lee Mikesell; 200) Gary E. Miller; 201) Kenneth Lee Miller; 202) Ronnie D. Miller; 203) Ronald O. Miller; 204) Bob Minney; 205) Lowell P. Mitchell; 206) Newell Mitchell; 207) Richard C. Mobley; 208) Harvey L. Monbeck, Sr.; 209) John R. Monroe; 210) Glenda L. Moore; 211) John D. Moore; 212) Mildred L Moore; 213) Marvin L. Morris; 214) Richard Edward Mulll; 215) Claren ce L. Mullins; 216) James A. Mutter;

217) Daniel Newsome; 218) Dale H. Nicholas; 219) Sylvia S. Nickell; 220) Donald Lee Noble; 221) Donald L. Null; 222) William R. O'Connell; 223) Patrick Lee O'Shea; 224) Ronnie L. Osborne; 225) Harry J. Otto; 226) Charles Pauley; 227) Michael R. Pennington; 228) Charles A. Petrey; 229) Robert e. Petry; 230) James Vernon Peyton; 231) James Phelps; 232) Wilburn G. Pigman; 233) mihaly A. Polczer; 234) Thomas W. Porter; 235) Darryl L. Powell; 236) Dennis Harry Powell; 237) Vernol H. Powell; 238) Thomas Wayne Presley; 239) Howard S. Price; 240) Charles W. Prosser; 241) David Pryor; 242) Lee Bruce Pryor; 243) Michael Dean Puterbaugh; 244) James C. Pyles; 245) Thomas; J. Ramsey; 246) Kurotibishi Ali Rashid; 247) David Eugene Rauch; 248) Michael L. Rauch; 249) William G. Retherford; 250) David T. Rhoden; 251) Paul R. Rickman; 252) Rufus Ridley; 253) Robert Rinehart, Jr.; 254) Lawrence Roark, Jr.; 254) Lawrence Roark, Jr.; 255) Dawn Cherie Roman; 256) Randle Rose;

257) Michael L. Rudd; 258) Lonnie R. Saunders; 259) William L. Schemel; 260) Henery e. Schleiger; 261) Glenn E. P. Scholz; 262) Robert G. Schroth; 263) Donald E. Shearer; 264) Harlis H. Sheets; 265) Philip H. Sheidan; 266) James L. Sherrit; 267) Earl Shilt, Jr.; 268) Jerry L. Short; 269) Tommy A. Short; 269) Tommy A. short; 270) Sheldon Sisco; 271) Ronald L. Skinner; 272) Larry O. Smith; 273) Robert Smith; 274) James Walter Spangler; 275) Lonnie Spencer; 276) Robert F. Stall; 277) Dennis Standifer; 278) James L. Steiner; 279) James Patrick Stiens; 280) Timothy L. Stuart; 280) Raymond Swope; 2820 Jerry A. Taylor; 283) Travis K. Taylor; 284) Raymond Terrell, Jr.; 285) Richard. L. Terrell; 286) Charles Thatcher; 287) Kenneth E. Thomas; 288) James T. Titus; 289) Jon R. Titus; 290) Dale R. Thompkins; 291) Ivan E. Tufts; 292) Danny Turner; 293) Paul Tyra; 294) Edgar P. Underwood, Sr.; 295) John L. VanCleve; 296) James P. Vaughn, Jr.; 297) David L. Vires; 298) Gary Wagers; 299) George Lewis Walker;

300) Lawrence E. Warren; 301) Bill L. Waters; 302) Donald P. Watkins; 303) David M. Weaver; 304) John E. Welch; 305) James E. West; 306) Duane T. Wheatley; 307) Leona A. Whitey; 308) Will White; 309) Donald D. Wigginton; 310) Autsin S. Wiley; 311) Kenneth R. Wiley; 312) Garry G. Williams; 313) James L Williams; 314) Roy D. Williamson; 315) Ronald Williford; 316) Paul s. Willis; 317) Ralph Edward Willis; 318) Roger L. Wills; 319) Robert J. Wilson; 320) Rusell W. Windsor; 321) Richard L. Winkler; 322) Charles H. Witham; 323) Rober S. Wynn; 324) James E. Wysocki; 325) Rober M. Yerian; 326) Paul e. Zimmerman; 327) Timothy R. Zwick; 328) Robert L. Ashman; 329) Gary W. Carmack; 330) George J. Eikens, II; 331) John F. Evans; 332) Gaylord F. Fitzwater; 333) V.L. Frenchf; 334) George E. Frymyer, Jr.; 335) Keith Gabbard; 336) Quentin E. Mobley; 337) Clifford H. Ruble; 338) John P. Ruble 339) Dwight A. Smith; 340) Joseph H. Smith, Jr.; 341) Clarence W. Tipton; 342) Cary G. Wogomon;

343) Fayetta Alexander; 344) Jacquelin Alexander; 345) Peggy J. Alexander; 346) Dorothy J. Allemang; 347) Louetta M. Alley; 348) Patricia g. Andruskewicz; 349) Janic A. Arahood; 350) Linda L. Arrington; 351) Elaine A. Astor; 352) Pamela J. Austin; 353) Norma J. Backus; 354) Patricia A. Bahns; 355) Patty A. Bailey; 356) Donnita Bari; 357) Joyce A. Barnes; 358) Gloria Bausmith; 359) Jan M. Belue; 360) Doris J. Brewer; 361) Cheryl L. Brock; 363) Jeanette E. Brown; 363) Linda R. Brown; 363a) Lois D. Brown; Sandra K. Brown; 365) Beth Burile; 366) Kathryn Burr; 367) Pamela R. Burton; 368) Deborah J. Carman; 369) Elizabeth J. Carr; 370) Linda Sue Cavey; 371) Madeliene C. Chambers; 372) Levie Childers; 373) Chalene L. Clark; 374) Yvonne M. Cleary; 375; Patricia A. Clemons; 376) Ina Collins; 377) Barbara Combs; 378) Eunice Combs; 379) Lillian M. Combs; 380) Vikki L. Conrad; 381) Sharon Cook; 382) Cheryl A. Cooper; 383) Janice A. Cordray; 384) Karen S. Couch;

385) Catherine A. Courtier; 386) Joan Cowens; 387) Gayle Cox; 388) Gisela Crouch; 389) Chris C. Cundif; 390) Hazel M. Curtis; 391) Patricia J. Dalton; 392) Vi Darst; 393) Doris Davidson; 394) Gladys K. Davidson; 395) Karen Davidson; 396) Sheila F. Davis; 397) Judith A. Day; 398) Peggy L. Deak; 399) Susan L. Denman; 400) Kay E. Dennision; 401) Sherry O. Eaton; 402) Jeanetta M. Edington; 403) Lana Ellinger; 404) Kathleen R. Evans; 405) Lou Ann Evans; 406) Vivian J. Finley; 407) Loraine Forsyth; 408) Beverly J. Freeman; 409) Cathy French; 410) Verna Gabbard; 411) Pat Garberson; 412) Susan E. Gardner; 413) Janet Garrod; 414) Beverly Garwood; 415) Pauline L. George; 416) Peggy L. Gilbert; 417) Rowena Gisewite; 418) Helen Glover; 419) Alic S. Goins; 420) Betty L. Green; 421) Carolyn S. Griffen; 422) Cathy M. Griffith; 423) Fran Grooms; 424) Susan K. Grooms; 425) Sandra K. Gropengieser; 426) Yvonne Grosshart; 427) Jane Gulasa; 428) Shirley F. Hall; 429) Gail Hamm; 430) Mary Lou Hamm; 431) Kathryn Hampton; 432) Bobbie F. Hardy; 433) Betty A.

Hardyman; 434) Wanda Hargrove; 435) Patricia S. Harlow; 436) Sharon M. Harowski; 437) Ramona G. Harris; 438) Ruthann Hartberger; 439) Connie Hatton; 440) Betty L. Haynes; 441) Judy A. Helfinstine; 442) Charlotte R. Helton; 443) Linda C. Henderson; 445) Thelma J. Henderson; 446) Chalotte A. Hendricks; 447) Gwyneth W. Herdman; 448) Shirley Higgins; 449) Sandra J. Holliday; 450) Carolyn K. Hosey; 451) Ruby R. Howard; 452) Deborah A. Hudson; 453) Narvelll Hughley; 454) Karen S. Hunder; 455) Dorothy Ishman; 456) Alene Ivey; 457) Gloria A. Jackson; 458) Shirley Jackson; 459) Mary Jamison; 460) Shirley F. Jellison; 461) Denise Jenks; 462) Darlene Jennings; 463) Bertha Johnson; 454) DeeAnna Johnson; 465) Karen S. Johnson; 466) Pat Jones; 467) Reva Kilburn; 468) Ovivia C. Kindred; 469) Carolyn King; 470) Judith A. Klingler; 471) Sharon Knight; 472) Mary K. Layne; 473) Mary M. Leadingham; 474) Wanda S. Leary; 475) Ida Mae Lee; 476) Chreyl A. Lett; 477) Sharon J. Leturgez

478) Nancy Lewis; 479) Rebecca D. Lewis; 480) Janic A. Logty; 481) Vivian D. Lykins; 482) Brenda McCarty; 483) Helen M. McIlvain; 484) Mary Ann McIntosh; 485) Melanie M. McMahan; 486) Evelyn Madden; 487) Gayle Malone; 488) Iva Nell Marshall; 489) Ronald Marshall; 490) Sandra L. Massie; 491) Esther Meadows; 492) Karen Sue Mercer; 493) Helen D. Merkison; 494) Sara Merritt; 495) Norma F. Mikesell; 496) Debbie Miller; 497) Patty L. Miller; 498) Shirley Miller; 499) C. Kaye Minney; 500) Elsie Mitchell; 501) Shirley Mitchell; 502) Quentin E. Mobley; 503) Terry L. Mobley; 504) Elfrieded K. Monbeck; 505) Anna M. Monroe; 506) Shirley Moore; 507) Brenda A. Morris; 508) Gloria L. Mullins; 509) Sandra L. Mutter; 510) Kathleen Newsome; 511) Elizabeth J. Nicholas; 512) Iva Rene Noble; 513) Doris No. Null; 514) Opal M. O'Connell; 515) Eldene O'Shea; 516) Judy A. Osborne; 517) Susan Otto; 518) Dorothy Pauley; 519) Wanda Pennington; 520) Linda Lou Petrey; 521) Dorothy A. Petry

522) JoAnn Petyon; 523) Ruth D. Pigman; 524) Carol Jean Porter; 525) Bessie K. Powell; 526) Berverly L. Powell; 527) Denise M. Presley; 528) Donna Price; 529) Jeanine R. Prosser; 530) Leslie R. Pryor; 531) Linda L. Pryor; 532) Debra E. Puterbaugh; 533) Diane T. Pyles; 534) Shirley S. Ramsey; 535) Ismailia Rashid; 536) Wanda Sue Rauch; 537) Joy B. Retherford; 538) Connie Rhoden; 539) Marilyn K. Rickman; 540) Cayth Ridley; 541) Myra Roark; 542) Cindy Rudd; 543) Linda Saunders; 544) Jeanice Schleiger; 545) Donna Jo Scholz; 546) Shirley E. Schroth; 547) Cynthia A. Shearer; 548) Rosemary Sheets; 549) Carol S. Sheidan; 550) Ellen J. Shilt; 551) Brenda S. Short; 552) Donna S. Short; 553) Marcia Sisco; 554) Lorraine Skinner; 555) Armon Smith; 556) Belinda Sue Spangler; 557) Tabitha Jane Spencer; 558) Judy Stall; 559) Barbara Standifer; 560) Barbara S. Steiner; 561) Betty D. Stiens; 562) Marian Swope; 563) Mafrey Taylor; 564) Patricia Taylor; 565) Brenda S. Terrell; 566) Wanda Terrell;

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In The

Supreme Court of the United States

October Term, 1991

JOHN J. ADKINS, ET AL.,

Petitioners,

v.

GENERAL MOTORS CORPORATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether this Court should review the Sixth Circuit's fact-bound determination that petitioners' state law causes of action are inextricably intertwined with collective-bargaining agreements and preempted by Section 301 of the Labor Management Relations Act, where the Sixth Circuit conscientiously and correctly applied the preemption test established in this Court's precedents and where its decision is consistent with the rulings of other courts of appeals.

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BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

Respondent General Motors Corporation ("GM") submits this brief in opposition to the petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 946 F.2d 1201. The district court's opinion sustaining in part GM's motion for summary judgment (App., *infra*, 1a) is unreported. The district court's opinion granting in part GM's motion for reconsideration of the court's decision on petitioners' motion to remand (App., *infra*, 7a) is reported at 713 F. Supp. 1043.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1991. The petition for a writ of certiorari was filed on January 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The question in this case is whether the court of appeals properly applied *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987), in holding that petitioners' state law claims were preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Petitioners originally asserted their claims in a Section 301 action, alleging that GM and their union had unfairly colluded to deny them certain special seniority rights. That action was dismissed as untimely. Petitioners then brought this action in state

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[1] The list of GM's non-wholly owned subsidiaries required by Rule 29.1 appears at Appendix, *infra*, 66a.

court, claiming fraud, tortious interference with contract rights, and intentional infliction of emotional distress. The court of appeals, after taking pains to decipher the "prolix and vague" allegations of petitioners' complaint (Pet. App. 7), unanimously held that these claims were preempted by Section 301. As this Court has recognized in denying certiorari petitions in several similar cases in recent years, there is no reason for the Court to review the court of appeals' application of settled law to the particular facts of cases such as this one.

A. The "Flow Arrangement" Under the Bridge Agreement

Until 1974, GM manufactured household appliances and automobile air conditioners at plants operated by its Frigidaire Division in Dayton, Ohio. Respondent International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, and its Local 801 (hereinafter referred to together as the "Union") was the collective-bargaining agent for Frigidaire's hourly employees. Initially, all Frigidaire workers were paid at the automobile industry rate, even if they were engaged in making household appliances. But in 1971, GM and the Union agreed that Frigidaire workers engaged in appliance manufacture would be paid the lower appliance industry rates. In return, these appliance workers were permitted to transfer – "flow" – to higher-paying automotive jobs within the Frigidaire Division as positions became available. In the event of layoff from an automotive job to which they had transferred, these workers were permitted to flow back to an appliance position, bumping less senior appliance workers if necessary. Pet. App. 4-5; *Adkins* v. *International Union of Elec., Radio, & Mach.*, 769 F.2d 330, 332 (6th Cir. 1985).

Frigidaire's automobile air conditioner facilities were split off in 1974 and became part of GM's Delco Air Conditioning Division, but the 1971 flow arrangement continued. Frigidaire's workers could transfer to higher-paying automotive air conditioning jobs at Delco, and if

laid off by Delco could transfer back to appliance jobs at Frigidaire with their seniority intact. 769 F.2d at 332.

The flow arrangement was not included in any formal collective-bargaining agreements until 1976. The December 10, 1976 Frigidaire Local Agreement as well as the Delco Local Agreement of the same date included a "Bridge Agreement" (App., *infra*, 35a) setting out the flow arrangement. Frigidaire Local Agreement 46 (Dec. 10, 1976); Delco Local Agreement 45 (Dec. 10, 1976). Frigidaire and Delco employees hired before 1977 (who were designated "red-circled" employees) continued to enjoy the flow rights, but newer employees would not. App., *infra*, 35a, 37a.

B. The Sale of Frigidaire And The Termination Of The Bridge Agreement

In 1979, GM sold its Frigidaire Division and laid off the Frigidaire employees. Pet. App. 5. GM retained the Dayton Frigidaire plants, however, converting them to use for GM's Chevrolet Division. At the time, the Delco plant was experiencing full employment. *Ibid.* With the sale of the Frigidaire Division, former Frigidaire employees working at Delco could no longer transfer back to Frigidaire in the case of a Delco layoff.

GM and the Union negotiated about the Frigidaire layoffs in February 1979. They agreed that the Frigidaire workers who would be laid off as a result of the sale would be hired in the new Chevrolet plants with unbroken seniority when these plants opened in 1981, and that the Union would continue to represent them. See Special Memorandum of Understanding between GM, IUE and Local 801 ¶¶ IV-VI (Feb. 23, 1979), App., *infra*, 43a-44a. This Agreement was ratified on February 23, 1979, and it cancelled the special seniority rights that had been given to former Frigidaire workers under the 1976 Bridge Agreement. *Id.* at ¶ I, App., *infra*, 41a. See also Pet. App. 5. The February 23 agreement was subsequently incorporated into the Local Agreement between Chevrolet and

Local 801. Chevrolet Local Agreement 43-45 (Oct. 1, 1979).

The February 23, 1979 agreement (and the October 1, 1979 Chevrolet Local Agreement) applied to the laid-off Frigidaire workers, and not to Delco workers. 769 F.2d at 333. GM and the Union renegotiated the Delco collective-bargaining agreement later that year. Because GM no longer owned Frigidaire, the new Delco contract did not continue the right of former Frigidaire workers to transfer back to Frigidaire Division jobs if they were laid off by Delco. See Delco Local Agreement 14-19 (Sept. 19, 1979).[2]

Late in 1979, an economic slowdown hit the automobile industry and Delco was forced to lay off thousands of employees, including many of the previously red-circled former Frigidaire workers. When Chevrolet reopened the former Frigidaire plants in 1981 and began to recall former Frigidaire employees, pursuant to the collective-bargaining agreements then in place, it did not offer the jobs to the laid-off Delco workers. 769 F.2d at 333.

C. The First Round Of Litigation: The Federal Action

A group of laid-off Delco workers who no longer had any rights to jobs at Frigidaire – including many of the petitioners – brought suit in federal court alleging violations of both Section 301 and Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act (LMRDA) (29 U.S.C. § 411(a)(1)). Pet. App. 2. This hybrid action alleged that the Union had breached its duty of fair

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[2] Petitioners imply that under the 1976 Bridge Agreement, they would have had the right to transfer to jobs at the former Frigidaire plants that reopened as Chevrolet plants in 1981. Pet. 10, 55-57. That is not correct; the Bridge Agreement gave such employees the right to transfer to jobs at the *Frigidaire Division* (App., *infra*, 37a), which ceased to exist as a GM division when it was sold in 1979.

representation and that GM and the Union "had colluded in negotiating a collective-bargaining agreement in order to abrogate the special seniority rights contained in" the Bridge Agreement. *Ibid.* The complaint also included pendent state law claims for breach of contract, tortious interference with contract rights, intentional infliction of emotional distress, and loss of consortium. *Id.* at 2-3.

The district court dismissed plaintiffs' federal labor law claims because they had been filed outside the six-month statute of limitations. See *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983). The court also dismissed (without prejudice) plaintiffs' pendent state law claims for want of a substantial federal question. *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188 (S.D. Ohio 1983). The court of appeals affirmed. 769 F.2d 330 (6th Cir. 1985).

D. This Litigation: Petitioners' State Complaint

In 1983, while the appeal of the dismissal of the federal complaint was pending, petitioners initiated this suit against GM and the Union in Ohio state court. Pet. App. 3. In a complaint which the court of appeals described as "prolix," "vague," and "very difficult to understand," petitioners alleged fraud, tortious interference with contract rights, and tortious infliction of emotional distress. *Id.* at 7. As the court of appeals noted, it is "not easy work" to "sift through the complaint in order to detect the factual allegations." *Ibid.* Insofar as GM can discern, the factual basis for all of petitioners' claims appears to be as follows:

Petitioners contend that the Union excluded red-circled Delco employees from notification and ratification of the February 23, 1979 agreement (which directly related not to Delco employees but to the laid-off employees of the sold Frigidaire Division). Pet. 8-9; Pet. App. 5-6; Compl. ¶¶ 29-34, App., *infra*, 49a-54a. They also allege that during the notification and ratification process for the September 19, 1979 Delco Local Agreement, the Union "concealed" the fact that the new Agreement "omitted"

and thereby "abandon[ed]" the Bridge Agreement. Pet. 9; Pet. App. 5-6. These allegations form part of the basis for petitioners' emotional distress claims. Pet. 9 (citing Compl. ¶¶ 30-37, App., *infra*, 50a-55a). Petitioners also claim that "the president of Local 801 had fraudulently induced them to ratify the 1979 collective-bargaining agreement that abrogated the 'bridge agreement.' " Pet. App. 16. See also Pet. 8-9, 52.

Petitioners further allege that between February 1980 and January 1981 "respondents continued to try to keep secret the abrogation of the Bridge Agreement," made "representations and innuendos" to petitioners that "jobs would be forthcoming," "reminded" petitioners "of the old custom of 'flowing,' " and made "[p]romises of employment * * * individually and in groups." Pet. 10. When the Chevrolet plants began work and only Frigidaire workers were recalled to them, petitioners who objected were "called * * * cry-babies and ridiculed." *Id.* at 11. These allegations are the basis for petitioners' fraud, tortious interference with contract, and emotional distress claims. Pet. 11-12 (citing Compl. ¶¶ 73-79, 83, App., *infra*, 61a-64a).

Finally, petitioners contend that these actions all arose out of a conspiracy between GM and the Union to maintain the Union as the Chevrolet Division bargaining agent, to divide labor, and to replace petitioners with lower paid workers. Pet. 7-8 (citing Compl. ¶¶ 15, 16, 25-27 and 43-48, App., *infra*, 46a-49a, 58a-61a).

In their demand for relief, petitioners made clear that they were really asserting rights under the various collective-bargaining agreements. In addition to seeking compensatory and punitive damages, declaratory relief, and other equitable remedies, petitioners asked for "injunctive relief * * * with respect to each of the collective bargaining agreements heretofore described in the complaint, declaring * * * the express and implied obligations, as well as the intendment, spirit and purpose of each of said collective bargaining agreements in each of the respects hereinabove alleged in this complaint" (Demand

For Relief ¶ 1, App., *infra*, 64a), and also asked "[t]hat GM be adjudged to have breached each of the collective bargaining agreements." *Id.* at ¶ 4, App., *infra*, 65a.

Respondents removed this case to federal court pursuant to 28 U.S.C. § 1441, on the ground that petitioners' state law claims are preempted by federal labor law. Pet. App. 3. The district court ultimately held that petitioners' fraud and tortious interference with contract claims were preempted in their entirety by federal law. App., *infra*, 17a-26a. The court also held that petitioners' emotional distress claims were preempted insofar as they claimed that GM and the Union caused them distress by such actions as proposing the elimination of the flow rights under the Bridge Agreement, withholding information from the workers, failing to consider the interests of those workers, and not permitting them fully to participate in the ratification process. But, in the district court's view, petitioners' emotional distress claims were not preempted insofar as they complained of the respondents' *conduct* in taking those actions. *Id.* at 26a-33a.

The court of appeals held that all of petitioners' claims were preempted and remanded with instructions to dismiss the entire complaint. Pet. App. 4. The court of appeals began its analysis with a careful review of this Court's Section 301 preemption decisions. *Id.* at 6-7, 11-14. The court recognized that "Section 301 preemption governs claims either founded directly on rights created by collective bargaining agreements or 'substantially dependent on analysis of a collective-bargaining agreement.' " *Id.* at 13, quoting *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987). If analysis of petitioners' tort claims is "inextricably intertwined with consideration of the terms of" the collective-bargaining agreements (*Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 (1985)), those claims are preempted by Section 301. Pet. App. 6-7, 17, 21-22. The court of appeals then considered each of petitioners' claims in turn and conducted the essentially fact-bound analysis of whether those claims were "substantially dependent on" or "inextricably intertwined with"

the terms of the collective-bargaining agreements between GM and the Union.

Turning first to petitioners' fraud claims, the court of appeals noted that those allegations were "not very clear." Pet. App. 16. The court identified two separate contentions that petitioners appeared to be making: that Local 801's president had fraudulently induced petitioners to ratify the 1979 Delco Local Agreement by concealing or misrepresenting its effect on their transfer rights, and that following ratification the president had made fraudulent misrepresentations regarding their transfer rights. The court of appeals held that both of those fraud claims were preempted. Pet. App. 14-19. The court held that the first claim was preempted because it would require analysis of the Bridge Agreement and the subsequent agreements to determine what rights they conferred and what rights they eliminated. *Id.* at 14-15. In addition, because the rights at issue in that claim were " 'created by collective-bargaining agreements,' " the claim was completely preempted. *Id.* at 15 (quoting *Caterpillar* at 394).

As to petitioners' second fraud claim, the court of appeals could not tell whether petitioners were alleging that after the ratification the Union president affirmatively misrepresented the terms of the 1979 agreement and told them that it did not affect their rights under the Bridge Agreement, or alternatively that he told them that "their purported entitlement to jobs at the Chevrolet plant would be respected, despite the 1979 collective-bargaining agreement." Pet. App. 16. The court held that in either event the claims were preempted. The former contention was preempted because it would require the court to ascertain petitioners' rights under the Bridge Agreement and the 1979 Delco contract, and to determine the accuracy of the Union president's alleged representations about the content of those agreements. *Id.* at 17. This fraud claim was "so intertwined with the terms of the collective-bargaining agreements * * * that they may not be separated." *Ibid.*, citing *Lueck*, 471 U.S. at 213.

Under the alternative interpretation of petitioners' claim (that they were told that the flow arrangement would remain in effect despite the 1979 agreement), the court of appeals held that the claim was preempted because the alleged job-entitlements were created and defined by the Bridge Agreement. Pet. App. 17-18. Adjudication of this claim once again would require "extensive" interpretation to determine "what plaintiffs' 'bridge agreement' rights were and whether they are being violated by the new arrangements." *Id.* at 18.

The court of appeals concluded that in their fraud claims petitioners were asking the court to find that Bridge Agreement rights terminated in the 1979 Local Agreements were "reborn under state law." Pet. App. 18. That would "create a situation in which rights extinguished under federal labor law were vital under state law. The purpose of the doctrine of complete preemption is to prevent one set of rights and obligations from issuing from a collective-bargaining agreement under federal law while contradictory rights and obligations flowed from state law. * * * Plaintiffs cannot be permitted to revive rights deemed extinguished under federal labor law by relying on state common law." *Id.* at 17-18.

The court of appeals next examined petitioners' tortious interference with contract claims, and held them to be likewise fully preempted. Pet. App. at 19-20. The court rejected petitioners' argument that their claims were like those raised by the plaintiffs in *Caterpillar*. In *Caterpillar*, the court noted, "the alleged contract between the plaintiffs and the employe[r] was independent of any collective-agreement." *Id.* at 19. But in this case, the rights claimed by petitioners were the "seniority rights" under the Bridge Agreement. *Id.* at 20. Petitioners' claims would therefore necessarily involve analysis of the terms of the Bridge Agreement. *Ibid.*

Finally, the court of appeals considered petitioners' emotional distress claims. Pet. App. 21-26. Analogizing to this Court's decision in *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), the court acknowledged that it is "theoretically

possible" that the conduct of union leaders in a case like this one might be so outrageous that state tort actions would be permitted. Pet. App. 25. But "no outrageous conduct has been alleged in this case"; rather, petitioners alleged only that "material information * * * was withheld from them." Such a claim "goes to the quality of their union representation and the fairness of their employer's labor practices, issues central to the concerns of federal labor law." *Ibid.* In these circumstances, absent "specific allegations" that the union or GM engaged in "outrageous conduct," "the state interest in adjudicating plaintiffs' emotional distress claims [is] too insubstantial to defeat complete preemption." *Ibid.*

REASONS FOR DENYING THE PETITION

Having failed to file their complaint alleging violations of the federal labor laws within the prescribed statute of limitations period, petitioners now seek to recast claims that arise out of and require interpretation of collective-bargaining agreements as state law violations. The Demand for Relief in petitioners' complaint makes it crystal clear that what they are seeking is relief from alleged violations of several collective-bargaining agreements. This Court, however, has repeatedly protected the comprehensive federal regulatory scheme constructed by the Labor Management Relations Act from undue interference by private actions under state law that seek to enforce claims under collective-bargaining agreements. In doing so, it has established workable preemption standards which require the courts to undertake just the kind of fact-intensive, "case-by-case" analysis carried out by the court of appeals. *Lueck*, 471 U.S. at 220. The courts below conscientiously applied those standards and reached the correct result.

Relying primarily on a case (*Wells* v. *General Motors Corp.*) they did not even cite in their court of appeals briefs, petitioners contend that there is a conflict among the circuits touching the issues in this case. But even a

cursory review of *Wells* makes it clear that the Fifth Circuit applied the same legal standard to very different facts and therefore reached a different result. There is absolutely no reason to believe that the Fifth Circuit would disagree with the Sixth Circuit if presented with the facts of this case.

Moreover, even were this Court inclined to elaborate further on the standards for Section 301 preemption, this case would provide an unsuitable vehicle. Petitioners' state law complaint is "prolix," "vague," and "very difficult to understand" (Pet. App. 7), and it is the incoherence of that complaint and petitioners' formless and shifting characterizations of their claims that have fueled nearly a decade of litigation. It is a struggle to penetrate the morass petitioners have created to ascertain a coherent set of claims. Once that is done, it becomes clear that this is an easy case, squarely preempted because it lies at the very heart of federal labor law concerns.

I. THE COURTS OF APPEALS HAVE CONSISTENTLY AND CORRECTLY APPLIED THE SECTION 301 PREEMPTION ANALYSIS MANDATED BY THIS COURT'S DECISIONS TO STATE LAW FRAUD AND TORTIOUS INTERFERENCE CLAIMS.

This Court's jurisprudence on the interpretation and application of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is well developed. Section 301(a) creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." This statute is not merely jurisdictional, but also "expresses a federal policy that federal courts should enforce [collective-bargaining] agreements" and that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, 456 (1957).

This Court has emphasized the necessity that "substantive principles of federal labor law * * * be paramount in the area covered by the statute." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Disputes about the interpretation of collective-bargaining agreements cannot be left to state law because "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' " *Ibid.* The Court has explained that "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Ibid.* Indeed, the "pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action" that explicitly or implicitly contends that an employer or bargaining agent breached its obligations under a labor contract. *Franchise Tax Bd.* v. *Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

This Court has elaborated on these principles no fewer than five times in recent years, beginning in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). In *Lueck* an employee subject to a labor contract filed a state law tort suit contending that his employer in bad faith failed to make disability insurance payments under a union-negotiated disability plan. The Court held this action pre-empted, observing that "[i]f the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. The court instructed (*id.* at 211) that

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Otherwise, "[t]he parties would be uncertain as to what they were binding themselves to" when they entered into a collective-bargaining agreement. *Ibid.* That would make

it "more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Ibid.*

The Court in *Lueck* enunciated a test for Section 301 preemption to deal with these concerns: a state law claim is preempted whenever it "is inextricably intertwined with consideration of the terms of the labor contract" (471 U.S. at 213), such that "any attempt to assess liability * * * inevitably will involve contract interpretation." *Id.* at 218. In other words, whenever "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

This Court has reiterated the same concerns – and applied the same preemption test – in each of its subsequent rulings in this area. In *Electrical Workers* v. *Hechler*, 481 U.S. 851, 853 (1987), the Court held Section 301 preempted "a state-law tort claim that a union has breached its duty of care to provide a union member with a safe workplace." A court deciding that claim "would have to ascertain, first, whether the collective-bargaining agreement * * * placed an implied duty of care on the Union to ensure that [the employee] was provided a safe workplace, and, second, the nature and scope of that duty." *Id.* at 862. Since " 'questions of contract interpretation [underlay] any finding of tort liability' " the employee was "precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action." *Ibid.*

In *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987), certain breach of contract claims escaped preemption where they were based on allegations that an employer had entered into individual employment contracts with the plaintiff employees at a time when they were not members of a bargaining unit or covered by any collective-bargaining agreement. The employees claimed that Caterpillar had agreed that it "would provide employment opportunities for [them] at other facilities" if their workplace were closed. *Id.* at 389. The claim that the

employer had entered into and breached these individual employment contracts was "not substantially dependent upon interpretation" of a labor contract, because the claim neither "rel[ied] upon" a contract nor "address[ed] the relationship between the individual contracts and the collective agreement." *Id.* at 395.

Similarly, in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the issue was whether Section 301 preempted an employee's state law allegation that she had been discharged in retaliation for filing a worker's compensation claim. Although the employee was covered by a collective-bargaining agreement that required "just cause" for discharge, the Court held that her state retaliatory discharge claim was not preempted. The state law claim depended on a purely factual inquiry whether the plaintiff was discharged and whether the employer's motive for the discharge was retaliatory. Such an inquiry would "not turn on the meaning of any provision of a collective-bargaining agreement." *Id.* at 407. *Lingle* reiterated, however, that "judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements." *Id.* at 411. Most recently, in *Steelworkers* v. *Rawson*, 495 U.S. 362, 369 (1990), this Court reaffirmed that a state tort suit is preempted when it is based on rights or duties "without existence independent of the collective-bargaining agreement."

Application of these Section 301 preemption standards requires close scrutiny of the plaintiff's allegations in each case. Over the last four years, this Court has denied petitions for certiorari in at least eleven cases involving the application of these standards to various state law claims.[3] That the courts of appeals in these

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[3] *White* v. *National Steel Corp.*, 938 F.2d 474 (4th Cir.), cert. denied, 112 S. Ct. 454 (1991); *McCormick* v. *AT&T Technologies*, 934 F.2d 531 (4th Cir. 1991), cert. denied, 112 S. Ct. 912 (1992); *Sluder* v. *UMW*, 892 F.2d 549 (7th Cir. 1989), cert. denied, 111 S.

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cases reached different results does not mean there is a conflict among the circuits that this Court has ignored. It simply reflects the fact that courts applying the proper preemption standards will reach different results when faced with different facts. There is certainly no reason for the Court to single out this case and to review the Sixth Circuit's conscientious analysis of petitioners' nearly unintelligible complaint.

It is particularly disingenuous for petitioners to pretend that this case is something other than a complaint bottomed on collective-bargaining agreements, when their original suit – which raised factual allegations substantially identical to those in the present suit – was expressly predicated on breach of collective-bargaining agreements within the meaning of Section 301. Petitioners' original suit was dismissed for untimeliness; but dilatoriness is surely not a justification for recycling a Section 301 claim as a state law claim and demanding application of divergent state law standards to construe and enforce the underlying collective-bargaining agreements.

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Ct. 45 (1990); *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990); *Terwilliger* v. *Greyhound Lines*, 882 F.2d 1033 (6th Cir. 1989), cert. denied, 495 U.S. 946 (1990); *Berda* v. *CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989), cert. denied, 493 U.S. 1062 (1990); *Smolarek* v. *Chrysler Corp.*, 879 F.2d 1326 (6th Cir.), cert. denied, 493 U.S. 992 (1989); *Richardson* v. *Steelworkers*, 864 F.2d 1162 (5th Cir.), cert. denied, 493 U.S. 803 (1989); *Utility Workers* v. *Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), cert. denied, 489 U.S. 1078 (1989); *Local No. 57* v. *Bechtel Power Corp.*, 834 F.2d 884 (10th Cir. 1987), cert. denied, 486 U.S. 1055 (1988); *Paige* v. *Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988).

A. The Sixth Circuit Faithfully And Correctly Applied The Section 301 Preemption Standards Enunciated In This Court's Decisions To Petitioners' Fraud And Tortious Interference Claims

The certiorari petition is premised on a series of misstatements about the decisions below. The linchpin of the petition is the repeated assertion that the court of appeals held that petitioners' state law fraud and tortious interference claims were preempted because they "merely *'relat[e]* to various collective bargaining agreements,' " and thereby applied a standard that this Court expressly rejected in *Lueck*, 471 U.S. at 220. Pet. 23. See also *id.* at 17, 48. This characterization of the test applied below is fallacious.[4] Both the court of appeals and the district court were meticulous in their adherence to the Section 301 preemption standards enunciated by this Court.

The court of appeals, after examining *Caterpillar* and this Court's other recent Section 301 preemption cases in great detail (Pet. App. 6-7, 11-14), held that petitioners'

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[4] Petitioners support each assertion that the court of appeals asked whether their claims were "related to" some labor contract with a citation to the court's opinion at Pet. App. 9. That citation is to part of a long quotation from the district court's decision, intended to "exemplif[y] the approach the [district] court took" to the problematic task of defining the claims contained in petitioners' "prolix and vague" complaint. *Id.* at 8. The cited quotation plays no operative role in the court of appeals' decision. Moreover, the district court was *not* applying a mere relationship standard at all, for the district court continued by saying that "[i]t would be impossible to determine whether the information provided to Plaintiffs by Defendants was false (or insufficient) without analyzing the terms of the various collective bargaining agreements." *Id.* at 9, quoting App., *infra*, 21a.

fraud claims were preempted because they were "substantially dependent on analysis" of the Bridge Agreement and the 1979 Delco contract (*id.* at 15) and "so intertwined with the terms of the collective-bargaining agreements present in the case that they may not be separated." *Id.* at 17. The court held that petitioners' tortious interference claims were preempted because they "necessarily involv[e] an analysis of" the collective-bargaining agreements between GM and the Union. *Id.* at 20. These same, well settled preemption principles guided the district court (see App., *infra*, 13a-17a), which properly asked as to each of petitioners' claims the question required by *Lueck* and *Caterpillar*: whether the claim was "substantially dependent" upon and "inextricably intertwined" with the construction of the terms of the various collective-bargaining agreements. See *id.* at 17a-32a.

A similar misrepresentation about the preemption standard applied below is implicit in petitioners' repeated but incomplete quotation of the court of appeals' statement that it "is immaterial" that the Union's alleged misrepresentations "took place outside the context of collective bargaining." Pet. 26, 46, quoting Pet. App. 17. The court of appeals recognized that state claims wholly independent of any collective-bargaining agreement are not preempted (see, *e.g.*, Pet. App. 13), and emphasized in the *very next sentence* of its opinion that "[t]he critical inquiry is whether a court adjudicating [petitioners' fraud] claim must determine rights arising under a collective bargaining agreement." *Id.* at 17.

Another equally baseless assertion is that the courts below held that petitioners' state law claims were preempted because respondents could have raised a defense grounded in federal labor law. Pet. 18-19, 58-59. The court of appeals gave this argument short shrift, pointing out that "the district court relied solely on the allegations on the face of the complaint" in holding petitioners' suit to be preempted. Pet. App. 14. The court of appeals' opinion likewise contains no suggestion that it looked to the nature of respondents' defenses. On the contrary, the

court was well aware of the rule in *Caterpillar* that federal defenses do not by themselves result in preemption of a state law claim (see *ibid.*), and its preemption analysis proceeded solely in terms of the elements of the claims presented on the face of the complaint. See, *e.g.*, *id.* at 17 (analyzing elements of fraud under Ohio law), 20 (contract claim), 25 (emotional distress claim).

Once the petition is stripped of these sorts of misrepresentations, it appears that petitioners' real complaint is simply that the court below erred in applying the standards set forth in *Lueck*, *Caterpillar* and this Court's other Section 301 preemption cases to the particular factual allegations underlying their tort claims. That argument is wholly without merit and would not warrant review by this Court in any event.

1. *Petitioners' Fraud Claims.* Petitioners apparently assert two categories of fraud claims. The first is based upon allegations that prior to the ratification of the 1979 Delco contract, the Local 801 president concealed and misrepresented the fact that the Bridge Agreement was not a part of the new Delco contract. Pet. 52. The second is based upon representations allegedly made by the Union president after the 1979 Delco contract had been ratified that petitioners retained flow rights under that contract and would be eligible for Chevrolet jobs based on the seniority accumulated under the Bridge Agreement. Pet. 50; Compl. ¶¶ 39-40. To make out these fraud claims under Ohio law, petitioners would have to show that respondents concealed or misrepresented a material fact, that they knew of or were indifferent to the concealment or misrepresentation and acted intending that the petitioners rely on it to their detriment, and that petitioners suffered damage as a consequence. See Pet. App. 14, 17 & Pet. 49-50, citing *Cohen* v. *Lamko, Inc.*, 462 N.E.2d 407 (Ohio 1984).

The claims that the Union concealed or misrepresented the effect of the 1979 Delco contract during the ratification process would embroil a court in a series of

"questions relating to what the parties to a labor agreement agreed, [which] must be resolved by reference to uniform federal law." *Lueck*, 471 U.S. at 211. To determine if the Union concealed or misrepresented the impact of the 1979 Delco contract on existing flow rights, a court would initially have to determine what petitioners' existing rights were. To do that, the court would first have to analyze the terms of the 1976 Delco agreement, including the Bridge Agreement. Among other things, the court would have to consider whether petitioners retained any rights under the Bridge Agreement after GM sold the Frigidaire Division; the Bridge Agreement only gave petitioners the right to transfer to jobs within the Frigidaire Division. App., *infra*, 37a. The court would then have to consider whether the termination of the Bridge Agreement by the Frigidaire contract of February 23, 1979 had an impact on any flow rights the Delco workers might have retained. After interpreting the 1976 Delco and 1979 Frigidaire contracts to see what rights Delco workers had at the time of the alleged misrepresentations, the court would then have to interpret the 1979 Delco contract in order to see what changes it worked. Only then could the truth or falsity of the representations alleged by petitioners be judged.

Finally, the Ohio law requirement that petitioners show damages would necessitate inquiry into what rights petitioners had lost in consequence of the alleged fraud. As the court of appeals noted (Pet. App. 14-15), that would require a court to compare petitioners' rights before and after ratification of the 1979 Delco contract.[5] In

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[5] This is not the sort of peripheral use of a labor contract "to determine the proper damages" for a state law violation that was sanctioned in *Lingle*, 486 U.S. at 413 n.12. This Court had in mind in *Lingle* that a "collective-bargaining agreement may * * * contain information such as rate of pay and other economic benefits that might be helpful" in fixing the amount of damages that should be awarded. *Ibid.* Here, a comparison

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short, an inquiry into the terms of the 1976 Delco contract and Bridge Agreement, the 1979 Frigidaire agreement cancelling the Bridge Agreement, and the 1979 Delco contract would be at the very heart of adjudication of this fraud claim.

A court adjudicating petitioners' second fraud claim would also have to engage in close analysis of collective-bargaining agreements. Although the petition describes in only vague terms the misrepresentations allegedly made by the Union after the ratification of the 1979 Delco contract (see Pet. 10), it is clear that each misrepresentation or concealment alleged in the complaint directly concerns the effect of the 1979 Delco contract on petitioners' seniority-based transfer rights. The Union allegedly "tr[ied] to keep secret the abrogation of the Bridge Agreement" by the 1979 contract. *Ibid.* Its president allegedly represented that rights acquired under the Bridge Agreement were "being fully recognized, preserved and perpetuated equitably and equally as to each [red-circled Delco worker] based on his order of Frigidaire seniority," and that petitioners "had nothing to worry about as they *** would *** participate fully in the Chevrolet jobs" in accordance with "the seniority acquired and accumulated at Frigidaire" – *i.e.*, under the Bridge Agreement. Compl. ¶ 40, App., *infra*, 56a-57a.

In order to determine if these alleged representations were false, or if the Union concealed some material fact, a court would have to interpret the 1979 Delco contract to see what rights it gave petitioners. In addition, a court would have to interpret various labor contracts simply in order to understand what was allegedly misrepresented by the Union. The content of the rights petitioners say

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of different labor contracts is necessary to determine whether petitioners suffered any damage at all as a consequence of the Union's alleged fraud, an essential element of a fraud claim under Ohio law.

they were told they retained under the 1979 contract are not to be found in the very general representations the Union is supposed to have made, but in the Bridge Agreement and the other collective-bargaining agreements that established and specified the flow rights to which those general representations referred. See Compl. ¶¶ 39-40. Then, because petitioners claim they were told they would have rights to transfer to *Chevrolet* jobs based on their Frigidaire seniority *(ibid.)*, the court would have to interpret the 1979 Frigidaire and Chevrolet agreements that gave Frigidaire workers rights to recall to Chevrolet. As if that were not enough, the requirement under Ohio law that a fraud plaintiff prove damages would also require the court to determine petitioners' rights under the agreement in effect before the 1979 Delco contract, as a baseline against which to measure the claims that the alleged misrepresentations and concealments harmed petitioners.

2. *Petitioners' Tortious Interference Claims.* Much of the same close analysis of collective-bargaining agreements would be essential to a resolution of petitioners' tortious interference with contract claims. These claims are based on the notion that the Union's alleged representations created a contract and that respondents tortiously interfered with petitioners' enjoyment of rights under that contract. Pet. 10-12, 55; Compl. ¶¶ 39-40, 74-80. Petitioners blithely assert that the Bridge Agreement is irrelevant to a determination whether a contract was created under Ohio law by the Union's alleged promises. Pet. 56-57. It is clear, however, as the court of appeals recognized (Pet. App. 20), that the terms of the alleged contract must derive from the Bridge Agreement and the other labor agreements that created and specified the flow rights that Frigidaire and Delco workers previously enjoyed. The promises the Union allegedly made were that petitioners would be entitled to jobs at the new Chevrolet plant in accordance with flow rights originally established by, and with the seniority accumulated under the terms of, the Bridge Agreement. Compl. ¶¶ 39-40. A

court adjudicating petitioners' tortious interference claims would thus have to analyze the Bridge Agreement to give content to the contract said to have been created by the Union's representations. Then, since the entitlement of those with Frigidaire seniority to jobs at Chevrolet was dependent on the 1979 Frigidaire and Chevrolet agreements, the court would necessarily have to interpret those agreements as well.

Petitioners' reliance on *Caterpillar* is misplaced. See Pet. 16, 54-55. The state breach of contract claims at issue in *Caterpillar* were founded on an employer's promises of permanent job security, made entirely separate from any collective agreements at a time when the plaintiffs were not even members of any bargaining unit. The terms of the alleged contracts were clear and wholly independent of any collective-bargaining agreements, so the state law claims did not "rely upon the collective agreement indirectly, nor * * * address the relationship between the individual contracts and the collective agreement." 482 U.S. at 395.

Here, petitioners assert that the Union represented that the "seniority acquired and accumulated at Frigidaire" under the Bridge Agreement continued to govern and that "accordingly" petitioners would "participate fully in the Chevrolet jobs." Compl. ¶ 40, App., *infra*, 56a-57a. Petitioners' claims thus "rely upon" the Bridge Agreement – and the 1979 Frigidaire and Chevrolet collective-bargaining agreements as well – to provide the terms of the contract they allege was created, and a court deciding petitioners' tortious interference claims would have to "address the relationship between the [alleged] individual contracts" and these three labor agreements. 482 U.S. at 395.

In sum, this is not a case in which it can plausibly be argued that state claims are in any sense independent of collective-bargaining agreements. Interpretation of a multiplicity of labor contracts would be essential to adjudication of petitioners' fraud and tortious interference claims, and would give rise to exactly that disruption of the

federal regulatory scheme that this court decried in *Lucas Flour*.

B. The Sixth Circuit's Decision That Petitioners' Fraud And Tortious Interference Claims Are Preempted Is Not In Conflict With Decisions Of Other Courts Of Appeals

Petitioners argue that the decision below is in conflict with *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990) – a case they did not even cite in their court of appeals briefs. But the Sixth Circuit here and the Fifth Circuit in *Wells* both applied the preemption standards set out in this Court's precedents. Compare pp. 7-9, *supra*, with 881 F.2d at 172-173. They reached different results only because they faced very different factual circumstances.

In *Wells*, a collective-bargaining agreement known as the Voluntary Termination of Employment Plan (VTEP) provided that employees of GM's Packard Electric plant who agreed to resign their jobs would receive severance pay. 881 F.2d at 168. The VTEP was totally silent as to the future employment eligibility of workers who elected to resign under this plan. *Id.* at 174. Some employees who took advantage of the VTEP later reapplied for work at Packard but were allegedly told that they were ineligible for rehire. *Id.* at 168. These employees filed suit claiming state law fraud and misrepresentation, alleging that a GM representative had told them prior to their election of VTEP benefits that they could subsequently be rehired if new jobs were created, "although they would have to apply like everyone else." *Ibid.* The Fifth Circuit held that "[u]nder these narrow circumstances" the employees' state claims were not preempted (*id.* at 175), because the purported promise of eligibility for rehire was wholly independent of the VTEP. *Id.* at 173-175.

The difference between *Wells* and this case is striking. In *Wells*, the court of appeals held the rehire rights claimed by plaintiffs were not even remotely connected to

a collective-bargaining agreement. On the contrary, they were merely rights to apply for a job in the future "like everyone else" (881 F.2d at 168) – that is, on the same basis as any new applicant approaching GM for a job without benefit of any collectively-bargained seniority or other advantages. Indeed, the Fifth Circuit held that rehire rights are not even mandatory subjects of collective-bargaining. *Id.* at 169-170. In consequence, the Fifth Circuit held that plaintiffs' state law fraud claim was "a highly fact-bound one concerning what was said, or promised," by GM's representative (*id.* at 173), and that no term of the VTEP was relevant to the court's inquiry. *Id.* at 173-174.

In the present case, in contrast, a court adjudicating petitioners' fraud and tortious interference claims could not avoid interpreting various collective-bargaining agreements, as we have shown above. In particular, the flow rights at issue in this case were solely a creature of collective bargaining – and were mandatory subjects of bargaining. See *Master Slack Corp.*, 230 NLRB 1054, 1055 (1977), enforced, 618 F.2d 6 (6th Cir. 1980); *United States Gypsum Co.*, 94 NLRB 112, 114-115 (1951), modified in other respects, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912 (1954). Red-circled Frigidaire and Delco workers enjoyed seniority, transfer and bumping rights only because these were provided for in the Bridge Agreement, which created those rights and gave them precise content. Frigidaire seniority became a basis for recall rights to the Chevrolet Division solely by virtue of the 1979 Frigidaire and Chevrolet agreements. Petitioners must rely on the collectively-bargained rights created by these agreements to provide the operative terms of the seniority and flow rights they allege they were promised by the Union president. See Compl. ¶¶ 39-40. In contrast to *Wells*, interpretation of collective-bargaining agreements is inescapable in adjudicating petitioners' claims.

Petitioners' fleeting assertion of other conflicts is equally insubstantial. Pet. 26-28. Upon closer inspection, each allegedly conflicting decision can be seen to have

rested on the precise role that the collective-bargaining agreement would play in reaching a decision on the state law claims, given the specific facts in issue. In *Anderson* v. *Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), cert. denied, 483 U.S. 1011 (1987), for example, Ford allegedly told plaintiffs before they were hired that they would be permanent employees and would not be bumped by employees who had preferential hiring rights pursuant to a collective-bargaining agreement. *Id.* at 955. Applying the *Lueck* test, the court of appeals held that state law fraud and breach of contract claims filed by the plaintiffs after they were displaced by preferential hirees were not preempted: the state claims were totally independent of any collective-bargaining agreement. *Id.* at 956-957. The right not to be bumped did not at all depend on a collective-bargaining agreement. Indeed, the representations alleged to have created that right were "made before the time [plaintiffs] became employees of [Ford], that is, before the time they were even covered by the collective bargaining agreement." *Id.* at 958. See also *Berda*, 881 F.2d 20 (no § 301 preemption of state claims based on pre-employment representation that plaintiff would not be laid off, where no labor contract would have to be interpreted to decide the claim); *Fox* v. *Parker Hannifin Corp.*, 914 F.2d 795, 801 n.5 (6th Cir. 1990) (individual contract rights predating or created after the expiration of a labor contract may give rise to viable state law claims).

In the present case, the seniority and flow rights allegedly represented by the Union to have survived the 1979 Delco agreement were those "acquired and accumulated at Frigidaire" under the Bridge Agreement, and which had been translated into an entitlement to Chevrolet jobs by virtue of the 1979 Frigidaire and Chevrolet agreements. Compl. ¶¶ 39-40. In other words, the very source of the rights represented to exist by Local 801's

president was a series of collective-bargaining agreements.[6]

Contrary to petitioners' assertion (Pet. 26-27) the court of appeals' decision does not conflict with *Karetnikova* v. *Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989), or *Paradis* v. *United Technologies*, 672 F. Supp. 67 (D. Conn. 1987). In *Karetnikova*, the district court permitted a state law civil rights claim to proceed where a college had allegedly failed to grant plaintiff tenure because of her political views. As in *Lingle*, plaintiff's claim raised purely factual questions about whether the board's tenure decision was motivated by plaintiff's exercise of First Amendment rights and did not involve rights under any collective-bargaining agreement. 725 F. Supp. at 79-80. Moreover, the court held that those rights were "at least in part" beyond the scope of collective bargaining, like the rights in question in *Lingle* – but unlike the seniority and flow rights at issue in this case. *Id.* at 81-82.

Similarly, in *Paradis* the district court applied the *Lueck* standard to a state law fraud claim premised on an

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[6] Petitioners also cite *Hanks* v. *General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990), *Anderson* v. *United Auto Workers*, 738 F. Supp. 441 (D. Kan. 1990), and a dissenting opinion in *McCormick*, 934 F.2d 531, as evidencing a conflict among the lower courts in the application of Section 301 preemption standards. Pet. 26-28. These cases do not involve fraud or tortious interference, but are primarily concerned with state law emotional distress claims. See pp. 27-29, *infra*. In *Milne Employees Ass'n* v. *Sun Carriers, Inc.*, 1991 U.S. App. LEXIS 27786 (9th Cir. 1991), also referred to by petitioners in passing (Pet. 48-49), the court of appeals held that state tortious interference claims were preempted, but that certain fraud claims were not. The decision was based on a careful analysis of plaintiffs' allegations and the elements of the state causes of action in light of the *Lueck* test. Unlike the flow rights at issue here, the fraud claims held not to be preempted in *Milne* did "not originate in or refer to rights and duties derived from the collective bargaining agreement" (*Milne* at *17).

allegation that an employer fired the plaintiff for prior drug use after representing that it would not do so. The court held that this fraud claim required no interpretation of a labor contract provision authorizing termination for just cause, because to succeed on the state claim the plaintiff "need only show that [his] termination was contrary to what defendant promised, not that it was unjust." 672 F. Supp. at 71. In the instant case, what the Union allegedly promised petitioners is the continuation of rights created by the Bridge Agreement, and the availability to red-circled Delco workers of jobs at the Chevrolet plant on the same terms enjoyed by red-circled Frigidaire workers under the 1979 Frigidaire and Chevrolet labor contracts. Moreover, the Union's alleged representations directly concerned the effect of yet another collective-bargaining agreement, the 1979 Delco contract. In this case, unlike *Paradis*, interpretation of collective-bargaining agreements would thus be central to any decision on petitioners' state law claims.

II. THE SIXTH CIRCUIT'S HOLDING THAT PETITIONERS' EMOTIONAL DISTRESS CLAIMS ARE PREEMPTED WAS CORRECT AND CONSISTENT WITH DECISIONS OF OTHER COURTS.

The fourth count of petitioners' complaint alleged that GM and the Union tortiously caused them emotional distress. Compl. ¶¶ 81-83, 89, App., *infra*, 63a-64a. Petitioners agree (Pet. 60-62) that to succeed on this cause of action under Ohio law they would have to prove that respondents engaged in "extreme and outrageous" conduct which caused them emotional distress. Pet. App. 21, quoting *Yeager* v. *Local Union 20*, 453 N.E.2d 666, 671 (Ohio 1983).

The factual allegations upon which this count is grounded are particularly murky. The district court, believing it had considered "each of the possible [emotional distress] claims" stated in the complaint (App., *infra*, 27a), thought petitioners were alleging that GM and

the Union acted outrageously in proposing, presenting, and urging adoption of the February 23, 1979 Frigidaire contract and the September 18, 1979 Memorandum of Agreement that reaffirmed that contract. *Id.* at 27a-32a. In the court of appeals, and again here, petitioners suggest in addition that the Union acted outrageously in concealing the fact that the 1979 Delco agreement "omitted" and "abandon[ed]" the Bridge Agreement. Pet. 9. Finally, to confuse matters further, petitioners relied below (Br. 33-34) and in their Petition (Pet. 60) on *Farmer* v. *Carpenters*, 430 U.S. 290 (1977) – a *Garmon* preemption case concerning the preemptive effect on state emotional distress claims of the NLRB's primary jurisdiction over unfair labor practice complaints. Section 301 preemption was not even an issue in *Farmer*. *Id.* at 295 & n.5.

Under *Lueck*, petitioners' emotional distress claims are plainly preempted insofar as they are based on alleged concealment or misrepresentations about the effect of the collective-bargaining agreements. Compl. ¶¶ 25, 27-28, 31, 35; Pet. 9. As the district court noted, the outrageousness of that alleged conduct "simply cannot be judged in a vacuum," but would require the court to "analyz[e] how the terms of the collective bargaining agreements were changed." App., *infra*, 28a. As we have shown, that would mean interpreting the Bridge Agreement and the 1979 Frigidaire, Delco and Chevrolet contracts. Insofar as petitioners were alleging that the Union failed to notify them and to allow them to participate in the ratification of the 1979 *Frigidaire* agreement, that would not only require careful examination of the various collective-bargaining agreements, but also interpretation of the Union constitution and by-laws and application of the LMRDA to determine which employees were entitled to participate in the ratification.

The court of appeals – at petitioners' invitation (see Br. 33-34; Pet. App. 22) – took a different approach to determining whether petitioners' emotional distress claims are preempted, analogizing the Section 301 inquiry

to that set out in *Farmer*. *Farmer* held that because the states have a substantial interest in protecting their citizens from tortious infliction of emotional distress (430 U.S. at 304), only claims that pose "a realistic threat of interference with the federal regulatory scheme" are preempted by reason of the NLRB's primary jurisdiction over union discrimination complaints. *Id.* at 305. By analogy to *Farmer*, the court of appeals acknowledged that a properly-pleaded claim of outrageous conduct in a case similar to this one might escape preemption. Pet. App. 25. But because petitioners made no "specific allegations of outrageous conduct," and instead merely alleged that GM and the Union concealed information about the 1979 collective-bargaining agreements – "issues central to the concerns of federal labor law" – petitioners' claims were preempted. Pet. App. 25.

Whatever the merits of the court of appeals' analogy to *Farmer*, it is clear that the decision below does not warrant this Court's review. The court of appeals determined that petitioners' claims are preempted because they failed specifically to allege any outrageous conduct. That is essentially a factual determination, and one as to which petitioners cite no conflicts among the circuits or other grounds that would warrant a grant of certiorari. The court of appeals' insistence that a plaintiff asserting an emotional distress claim allege some outrageous conduct is a reasonable way to ensure that state claims that would interfere with the federal regulatory scheme are not permitted to proceed. Moreover, the court's analysis led to precisely the result demanded by *Lueck*, and for the same ultimate reason – that in substance petitioners' claims are about the terms of collective-bargaining agreements.[7]

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[7] As the court of appeals noted (Pet. App. 21), under the law of Ohio a claim of tortious infliction of emotional distress requires allegations of conduct that is "extreme and outrageous." *Yeager*, 453 N.E.2d at 671. Here, the court of appeals, crediting all of the

(Continued on following page)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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well-pleaded facts in the complaint, found no "specific allegations of outrageous conduct." Pet. App. 25. Before attempting to reconcile federal labor law with state common law governing claims of outrageous conduct, this Court should await a case in which the elements of the state law cause of action are actually pleaded.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

JOHN J. ADKINS, et al.,	:	
Plaintiffs,	:	**Case No. C-3-83-1088**
vs.		
GENERAL MOTORS CORPORATION, et al.,	:	
Defendants.	:	

DECISION AND ENTRY SUSTAINING MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT ON THOSE CLAIMS PREVIOUSLY DEEMED PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT (DOC. #43 AND DOC. #48); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS ON SAID CLAIMS SET FORTH IN COUNTS TWO AND THREE OF PLAINTIFFS' COMPLAINT AND ¶¶ 25, 27, 28, 35 AND THAT PORTION OF ¶ 31 RELATING TO THE CIRCULATION OF INFORMATION SET FORTH IN COUNT FOUR OF PLAINTIFFS' COMPLAINT; THAT PORTION OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT GENERAL MOTORS SEEKING TO HAVE THIS COURT RECONSIDER ITS PRIOR RULING (DOC. #40), REMANDING TO STATE COURT ¶¶ 30, 33, 36 AND A PORTION OF ¶ 31, OVERRULED; ¶¶ 30, 33, 36 AND A PORTION OF ¶ 31 ORDERED REMANDED TO STATE COURT; TERMINATION ENTRY

[FILED January 24, 1990]

On August 16, 1988, this Court filed a Decision and Entry (Doc. #40) which, *inter alia*, granted the Defendants' previous Motions for Reconsideration and, in so doing, concluded that Counts Two and Three of the Plaintiffs' Complaint and that portion of Count Four which dealt with the circulation of certain information, to wit: that set forth in ¶¶ 25, 27, 28, 35 and a portion of ¶ 31, are preempted by § 301 of the Labor Management Relations Act ("LMRA") and, accordingly, would not be remanded to state court. Ruling further, this Court concluded that the Defendants' Motions for Reconsideration were overruled as they related to the remainder of Count Four of the Plaintiffs' Complaint (¶¶ 30, 33, 36 and a portion of ¶ 31). This Court ruled that those portions of Count Four, not preempted by the LMRA, would be remanded to state court. Finally, this Court concluded that those claims determined by this Court to be preempted by § 301 of the LMRA (i.e., those found in Count Two, Count Three, and that portion of Count Four related to ¶¶ 25, 27, 28, 35 and a portion of ¶ 31) might possibly be barred by the six-month statute of limitations established by § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b). The Court granted Defendants 20 days from the entry of said decision to file a properly documented motion for summary judgment to that effect.

The Defendants have filed such a Motion for Summary Judgment seeking a judgment in their favor and against the Plaintiffs on those claims set forth in the Plaintiffs' Complaint which this Court determined on August 16, 1988, to be preempted by § 301 of the LMRA (Count Two, Count Three and that portion of Count Four

relating to ¶¶ 25, 27, 28, 35 and a portion of ¶ 31). (Doc. #43 and Doc. #48). In addition, the Defendant General Motors Corporation has sought a ruling by this Court reconsidering that portion of its Decision of August 16, 1988, which ordered remanded to state court certain claims set forth in ¶¶ 30, 33, 36 and a portion of ¶ 31, as not preempted by § 301 of the LMRA. The moving Defendant would have this Court reconsider its prior Order of remand, retain those claims within the federal court's jurisdiction, pursuant to the principles of pendent jurisdiction, and, consequently, grant the moving Defendants' Motion for Summary Judgment on the grounds that the state law claims, previously deemed by this Court to be not preempted by § 301, are either barred by the applicable six-month statute of limitations or fail to state claims against the moving Defendant upon which relief can be granted.

Based upon the reasoning and citations of authority set forth in the memoranda filed by the moving Defendants in support of their Motion for Summary Judgment on those claims set forth in the Plaintiffs' Complaint previously deemed by this Court to be preempted by § 301 of the LMRA, i.e., Count Two, Count Three, and that portion of Count Four set forth in ¶¶ 25, 27, 28, 35 and a portion of ¶ 31, this Court deems said motions to be well taken and same are, therefore, sustained in their entirety.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Each of the claims of the Plaintiffs set forth in the aforesaid Count Two, Count Three and the above referenced paragraphs set forth in Count Four are barred by

the applicable six-month statute of limitations set forth in § 10(b) of the NLRA, as said statute has been interpreted by the United States Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

2. This Court has previously held, which holding has been affirmed by the United States Court of Appeals for the Sixth Circuit, that Plaintiffs' federal claims accrued in January, 1981, and were barred by the six-month statute of limitations found in § 10(b) of the NLRA. Accordingly, it is axiomatic that Plaintiffs' state claims that this Court has held to be preempted by § 301 of the LMRA, likewise, accrued in January, 1981, and are also barred by the aforesaid six-month statute of limitations. If federal claims are barred on statute of limitations grounds, it is nothing less than the exercise of common sense to conclude that claims properly removable, as preempted by federal law, must likewise be disposed of on the same statute of limitations grounds.

This Court will overrule that portion of the Motion of the Defendant General Motors Corporation seeking an Order of the Court reconsidering that portion of its August 16, 1988 (Doc. #40) Decision and Entry which ordered remanded to the state court that portion of the Plaintiffs' Complaint which was not preempted by § 301 of the LMRA, to wit: ¶¶ 30, 33, 36 and a portion of ¶ 31 as they relate to Count Four of the Plaintiffs' Complaint. Those paragraphs relating to Count Four of the Plaintiffs' Complaint will be remanded to the state court.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Since the Court has ordered the entering of summary judgment in favor of the Defendants and against the Plaintiffs, on all aspects of the Plaintiffs' state court filed claims which this Court has determined are preempted by § 301 of the LMRA, there are no longer federal claims pending upon which any purely state law claims could pend. In *Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the United States Supreme Court stated that "If the federal claims are dismissed before trial . . . the state claims should be dismissed as well." While this rule does not establish a mandatory rule to be applied inflexibly in all cases, *see Rosado v. Wyman*, 397 U.S. 397, 403-405 (1970), "[t]he statement simply recognizes that in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness and comity – will point toward declining to exercise jurisdiction over the remaining state law claims." *Carnegie-Mellon University v. Cohill*, 108 S. Ct. 614, 619 n.7 (1988).

2. Even were this Court to have the unfettered discretion to maintain jurisdiction over the purely state law claims, even without any federal law claims to which those state law claims could pend, this Court would decline to exercise said jurisdiction believing that matters of purely state law, particularly in the areas involved in the Plaintiffs' Complaint which deal with matters of state law which are undergoing a period of rapid evolution, must be decided by state courts.

WHEREFORE, based upon the aforesaid, this Court grants the Motions of the Defendants (Doc. #43, Doc. #48), seeking summary judgment in their favor and

against the Plaintiffs herein on the federal claims for relief (those state law claims deemed preempted by federal law) and, ruling further, overrules that portion of the Motion for Summary [Judgment] of the Defendant General Motors, seeking an Order of the Court reconsidering its prior decision and thus maintaining jurisdiction over the state law claims and rendering summary judgment thereon.

It is the Order of this Court that the Office of the Clerk of Courts prepare a Final Judgment Entry to the effect that:

1. Summary judgment is entered in favor of the Defendants and against the Plaintiffs herein, on all claims set forth by the Plaintiffs in Count Two, Count Three and ¶¶ 25, 27, 28, 35 and the portion of ¶ 31 relating to the circulation of information in Count Four of Plaintiffs' Complaint.

2. Those claims set forth in ¶¶ 30, 33, 36 and that portion of ¶ 31 relating to the denial of Plaintiffs' right to participate in the ratification vote, all set forth in the fourth count of the Plaintiffs' Complaint, having been deemed to be *not* preempted by § 301 of the LMRA, are ordered remanded to the Montgomery County Court of Common Pleas.

3. The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

John J. ADKINS, et al., Plaintiffs,

v.

GENERAL MOTORS CORPORATION, et al., Defendants.

No. C-3-83-1088.

United States District Court, S.D. Ohio, W.D.

Aug. 16, 1988.

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART THE MOTIONS OF DEFENDANT UNIONS (DOC. #21) AND DEFENDANT GENERAL MOTORS CORP. (DOC. #22) FOR RECONSIDERATION, AND, ACCORDINGLY, VACATING IN PART THE COURT'S DECISION AND ENTRY SUSTAINING IN PART, AND OVERRULING IN PART, PLAINTIFFS' MOTION TO REMAND (DOC. #9); DECISION AND ENTRY VACATING IN PART THE COURT'S DECISION AND ENTRY SUSTAINING THE MOTION OF DEFENDANT UNIONS FOR SUMMARY JUDGMENT (DOC. #19); DECISION AND ENTRY OVERRULING PLAINTIFFS' MOTION FOR COSTS (DOC. #11) IN ITS ENTIRETY; FURTHER PROCEDURES ORDERED OF THE DEFENDANTS.

RICE, District Judge.

This case is before the Court on the Motions of the Defendants (Doc. #21; Doc. #22) for Reconsideration of the Court's Decision and Entry sustaining in part, and overruling in part, the Motion to Remand (Doc. #9) and on the Motion of the Plaintiffs for Costs (Doc. #11). For the reasons briefly set forth below, the Defendants'

Motions for Reconsideration are sustained in part and overruled in part; the Court's Decision and Entry sustaining in part, and overruling in part, Plaintiffs' Motion to Remand (Doc. #9) is, accordingly, vacated in part; the Court's Decision and Entry sustaining the Motion of Defendant Unions for Summary Judgment (Doc. #19) is vacated in part; and the Motion of Plaintiffs for Costs (Doc. #11) is overruled in its entirety.

I. A PROCEDURAL BACKGROUND

An understanding of the procedural posture of this case requires a brief summary of litigation previously brought before this Court. In January, 1982, many of the Plaintiffs in the instant case filed suit in this Court against the same Defendants, namely, Defendant General Motors Corp. (GMC), Defendant International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE), and Defendant Local 801. *Adkins v. General Motors Corp.*, No. C-3-82-011 (S.D. Ohio Jan. 18, 1982). The Amended Complaints therein contained two counts.[1] Plaintiffs' advanced federal claims in the first count, alleging that the IUE and Local 801 violated their duty of fair representation, and that GMC breached a contract, with respect to the negotiation, adoption, and implementation of certain collective bargaining agreements. Count One thus presented a "hybrid" action under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and a

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[1] "[A] court may take judicial notice of its own record of another case between the same parties." *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 441 (6th Cir. 1981).

claim under § 101(a)(1) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(1). Invoking the Court's pendent jurisdiction, Plaintiffs also set out four state claims in Count Two of the Complaints: tortious interference with contract; breach of contract; infliction of mental anguish; and loss of consortium.

GMC moved to dismiss the Complaint, pursuant to Fed.R.Civ.P. 12(b)(6), alleging that it failed to state a claim upon which relief could be granted. This Court sustained in part, and overruled in part, the Motion to Dismiss. *Adkins v. General Motors Corp.*, 556 F.Supp. 452 (S.D. Ohio 1983) (*Adkins I*). With respect to the federal claims, this Court held that same were sufficiently pleaded to survive a motion to dismiss, *except* that the spousal Plaintiffs had no standing to proceed. *Id.* at 456. With respect to the state claims, the Court considered two lines of defense raised by GMC: that the claims were preempted by federal labor statutes and, in any event, did not state a cause of action under Ohio law. *Id.* The Court held as follows: (1) the tortious interference with contract claim did not state a cause of action under Ohio law; (2) the breach of contract claim was preempted by LMRA § 301; (3) the infliction of mental distress claim did not state a cause of action under Ohio law, at least against GMC, and (4) the loss of consortium claim could go forward. *Id.* at 457-58.

Eventually, all Defendants moved for summary judgment, pursuant to Fed.R.Civ.P. 56, on the grounds that, *inter alia*, the federal claims were barred by the applicable statute of limitations. On April 15, 1983, this Court issued an opinion agreeing with Defendants' position, holding that the federal claims were barred by applying the six-month statute of limitations found in § 10(b) of the

National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). *Adkins v. General Motors Corp.*, 573 F.Supp. 1188, 1201 (S.D. Ohio 1983), *aff'd*, 769 F.2d 330 (6th Cir. 1985) (*Adkins II*). In the same decision, this Court dismissed the pendent state claims without prejudice, subject to any further litigation Plaintiffs might wish to pursue in the state courts. *Id.* at 1201-02. Shortly thereafter, the Court entered judgment in favor of the Defendants. On July 18, 1985, following Plaintiffs' appeal of said judgment, the Sixth Circuit Court of Appeals affirmed this Court's judgment. *Adkins v. International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330, 337 (6th Cir. 1985) (*Adkins III*).

Apparently following this Court's suggestion, some 817 Plaintiffs (most of whom were parties to the *Adkins* litigation in federal court) filed suit in Montgomery County Common Pleas Court on September 19, 1983 (No. 83-2596). The Complaint therein is of quite similar length and style to the Complaints filed in the federal litigation. While the *factual* contentions are quite similar, the state court Complaint does not refer to any federal statute. Instead, the Complaint sets out, in somewhat different form, the four state law causes of action set forth in the Complaints filed in federal court. Defendants (the same as those in the federal lawsuit) removed the suit (the instant action) to this Court in timely fashion, pursuant to 28 U.S.C. § 1441, contending that this Court would have original jurisdiction of the case under NLRA and the LMRA (Doc. #1). Plaintiffs then moved to remand the matter back to state court, pursuant to 28 U.S.C. § 1447 and Fed.R.Civ.P. 81(c), on the basis that the removal was improvidently granted.

On January 20, 1984, this Court filed a Decision and Entry sustaining in part and overruling in part the Plaintiffs' Motion to Remand (Doc. #9). *See Adkins v. General Motors Corp.*, 578 F.Supp. 315 (S.D. Ohio 1984) (*Adkins IV*). In *Adkins IV*, the Court concluded that "Plaintiffs have made assertions in their lengthy complaint (e.g., breaches of a collective bargaining agreement, and of the duty of fair representation) which inexorably lead to the conclusion that a 'hybrid' § 301 action is being pleaded." *Id.* at 318. The Court further concluded that certain other assertions within the Complaint could give rise to an action under LMRDA § 101(a)(1). *Id.* at 319. Accordingly, this Court overruled Plaintiffs' Motion to Remand "to the extent that the state court complaint can be read as advancing claims under LMRA § 301 or LMRDA § 101." *Id.* Plaintiffs' Motion to Remand was, however, sustained with regard to the remainder of Plaintiffs' claims on the theory that said claims were *not* preempted by § 301. Subsequently, on March 9, 1984, Defendant IUE and Defendant Local 801 filed a motion with this Court seeking an Order granting summary judgment in their favor upon all of Plaintiffs' *federal* claims. Subsequently, this action was stayed pending the outcome of Plaintiffs' appeal of the *Adkins II* decision (Doc. #15). Following the Sixth Circuit's affirmation of *Adkins II*, in a decision filed June 26, 1987, this Court sustained Defendant Union's Motion for Summary Judgment in its entirety on the grounds that Plaintiffs' federal claims were barred by the six-month statute of limitations contained in 29 U.S.C. § 160(b), and indicated that judgment would be granted in favor of all Defendants (including Defendant GMC) and against the Plaintiffs on the first and second causes of

action set forth in the Plaintiffs' Complaint (Doc. #19). In a letter attached to said decision, the Court noted that while Plaintiffs' federal claims were dismissed, the Court had granted Defendants leave to move for reconsideration of the Court's Decision remanding Plaintiffs' state claims (Doc. #20).

On July 8, 1987, Defendants filed the Motions for Reconsideration currently before the Court (Doc. #21; Doc. #22). In said motions, Defendants basically assert that in light of certain recent United States Supreme Court decisions on the issue of federal preemption under § 301 of the LMRA, the Court should re-examine its Decision and Entry sustaining in part and overruling in part Plaintiffs' Motion to Remand. Specifically, Defendants assert that Count Two of Plaintiffs' Complaint (which alleges misrepresentation on the part of Defendants), Count Three of Plaintiffs' Complaint (which alleges that Defendants tortiously interfered with Plaintiffs' contractual and/or business relationships), and Count Four of Plaintiffs' Complaint (which alleges that Defendants negligently and/or intentionally inflicted severe emotional distress upon Plaintiffs) are preempted by § 301 of the LMRA, and thus, are properly removable to this Court, and therefore, *not* remandable to the Montgomery County Court of Common Pleas.

At this point in time, there appears to be some confusion as to the status of Count Two of Plaintiffs' Complaint. Certain language within the Court's Decision and Entry sustaining in part and overruling in part, the Plaintiffs' Motion to Remand indicates that said motion was

sustained with regard to Count Two of Plaintiffs' Complaint. However, as previously noted, this Court's Decision and Entry sustaining the Motion of Defendant Unions for Summary Judgment (Doc. #19) indicates that judgment will be granted in favor of all Defendants and against the Plaintiffs on Count Two of Plaintiffs' Complaint. In order to alleviate any confusion, the Court hereby vacates its Decision and Entry sustaining the Motion of Defendant Unions for Summary Judgment as it relates to Count Two of Plaintiffs' Complaint. In this Decision, the Court will re-examine the propriety of removing Count Two, Count Three, and Count Four of Plaintiffs' Complaint from the Montgomery County Common Pleas Court.

II. THE PROPRIETY OF REMOVAL

A. *Preemption and § 301 of the LMRA*

Before discussing the specific claims which Defendants assert are preempted by federal law, the Court finds it necessary to provide a brief overview of the applicable law. The Court notes that since its original decision on Plaintiffs' Motion to Remand, the Supreme Court has handed down four decisions which significantly clarify when claims brought under state law are preempted by federal labor-contract law.

The first in the quartet of cases analyzing the preemptive effect of § 301 of the LMRA was *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). In *Allis-Chalmers Corp.*, the Supreme Court held that "§ 301 of the Labor Management Relations Act pre-

empts a state-law tort action for bad-faith delay in making disability-benefit payments due under a collective-bargaining agreement." *Id.* at 208. In so doing, the Supreme Court noted that "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend *beyond* suits alleging contract violations." *Id.* at 210 (emphasis added). "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Id.* at 211. In determining whether a state-law claim is in fact preempted by federal labor law, the key question which must be answered is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. "When resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, *see Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), or dismissed as preempted by federal labor contract law." *Id.* at 220. Thus, in the case at bar, if it is impossible to consider one of Plaintiffs' claims, without analyzing the terms of one or more of the collective bargaining agreements, said claim must be treated as preempted by § 301.

The Court next dealt with the issue of preemption under § 301 in the case of *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987). In *Hechler*, the plaintiff, who had been injured

in the course of her employment, asserted that the defendant union had negligently breached its "duty to insure that . . . [plaintiff] 'was provided safety in her work place and a safe work place' and to insure that . . . [plaintiff] 'would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience.' " *Id.* 107 S.Ct. at 2164. Plaintiff admitted that the "nature and scope" of said duty was dependent upon the terms of the collective bargaining agreement between her union and her employer. *Id.* In concluding that the plaintiff's negligence claim was in fact preempted by § 301, the Supreme Court noted that the defendant union's tort liability could not be determined without considering "whether the collective-bargaining agreement in fact placed an implied duty of care on the Union . . . . " *Id.* 107 S.Ct. at 2168. The Supreme Court found that the plaintiff's negligence claim *was* preempted because any consideration of said claim would have required interpretation of the collective bargaining agreement and there is a "need for federal uniformity in the interpretation of contract terms. . . . " *Id.*

The Supreme Court once again dealt with the preemptive force of § 301 in the case of *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). In *Caterpillar*, the Supreme Court concluded that as the plaintiff-employees' claims of breach of contract were founded upon an independent agreement, no interpretation of the collective bargaining agreement was required, and thus, said claims were *not* preempted by § 301. *Id.* 107 S.Ct. at 2431. Although the Supreme Court found there to be no preemption in *Caterpillar*, it once again emphasized that "[s]ection 301 governs claims

founded directly on rights created by collective-bargaining agreements, *and also* claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Id.* (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 2166-67, n. 3, 95 L.Ed.2d 791 (1987)).

Finally, the Court once again examined the issue of preemption under § 301 in the recent case of *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). In *Lingle*, the Supreme Court found that the plaintiff's state law claim for retaliatory discharge was *not* preempted by § 301, despite the fact that the plaintiff's collective bargaining agreement also provided plaintiff with a contractual remedy for wrongful discharge. The Supreme Court concluded that the plaintiff's state-law claim was " 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for section 301 pre-emption purposes: resolution of the state-law claim . . . [did] not require construing the collective-bargaining agreement." *Id.* 108 S.Ct. at 1882. In other words, the Supreme Court concluded that the state claim did not turn "on the interpretation of a collective bargaining agreement for its application." *Id.* 108 S.Ct. at 1882 n. 7. Basically, the Court concluded that even in the absence of a collective bargaining agreement, the Plaintiff would have had the same right to be free from wrongful discharge. Resolution of the state-law claim simply did not require any interpretation of the collective bargaining agreement.

Based upon all of the foregoing, the Court concludes that in the case at bar, it cannot simply rely upon the fact that Plaintiff's claims are couched in terms of state-law violations. The Court takes special note of the fact that

the above-discussed cases indicate that there are *two separate and distinct* bases for preemption. *First*, state claims involving rights which arise from a labor agreement are preempted by § 301. *Caterpillar*, 107 S.Ct. at 2431. *Second*, state claims which are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" are preempted by § 301 regardless of whether or not said claims involve rights which arise from the agreement. *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1916. The evaluation of both types of claim "is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213, 105 S.Ct. at 1912. Thus, in the case at bar, the Court must carefully consider whether any or all of Plaintiff's state law claims arise from *and/or* require the interpretation of any of the various collective bargaining agreements.

B. *Count Two: Misrepresentation*

In Count Two of their Complaint, Plaintiffs assert that certain "acts, omissions, and conduct of the Defendants, jointly and severally were wrongfully motivated misrepresentations of fact to the Plaintiffs, both constructively and actually, and were the result of the intentional and/or negligent conduct of the Defendants." (Doc. #1, Complaint, at ¶ 49). For the reasons briefly set forth below, the Court concludes that the evaluation of Count Two "is inextricably intertwined with consideration of the terms of the" collective bargaining agreements, and thus, is preempted by § 301. *Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S.Ct. at 1912.

Under Ohio law, the following elements are required in order to establish fraud:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> "(b) which is material to the transaction at hand,
>
> "(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> "(d) with intent of misleading another into relying upon it,
>
> "(e) justifiable reliance upon the representation or concealment, and
>
> "(f) a resulting injury proximately caused by the reliance."

Cohen v. Lamko, Inc., 10 Ohio St.3d 167, 462 N.E.2d 407, 409 (1984) (quoting *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (Ct.App.1980) (syllabus, ¶ 1)). As virtually every fraudulent representation allegedly made by Defendants relates in one way or another to the terms of the various collective bargaining agreements, this Court must conclude that consideration of Plaintiffs' claim of fraudulent misrepresentation is "substantially dependent" upon the terms of said agreements.[2]

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[2] Paragraph 15 of Plaintiffs' Complaint states: The claimed breaches as well as the tortious interference with plaintiffs' rights, contracts and employment, the intentional and negligent infliction of emotional distress upon the plaintiffs, fraul [sic] and deceit, involve and concern said defendants wrongful conduct in:

(Continued on following page)

As noted in Plaintiffs' Memorandum in Opposition to Motion for Reconsideration, "Plaintiffs essentially claim

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(Continued from previous page)

(a) the implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Frigidaire Division, General Motors Corporation and Local 801, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, December 10, 1976" including without limitation the "Bridge Agreement" dated December 10, 1976 contained at pages 46-52 of said booklet;

(b) the implementation and enforcement of the National Agreement of December 10, 1976;

(c) the negotiation, manner of adoption, adoption, implementation and enforcement of "Special Memorandum of Agreement Between General Motors Corporation and the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC and its Local 801" dated February 23, 1979;

(d) the negotiation, manner of adoption, adoption, implementation and enforcement of that "Memorandum of Agreement" between GM and IUE and 801, dated February 23, 1979, which in part provides that all employees who become laid off from Frigidaire "will have the same layoff status as if they had been laid off from Delco Air Conditioning Division except," etc.;

(e) the implementation and enforcement of the National Agreement of September 18, 1979;

(f) the negotiation, manner of adoption, adoption, implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Chevrolet-Moraine Engine Plant,

(Continued on following page)

that the negligent or intentional misrepresentations of each defendant induced Plaintiffs to enter the 1979 collective bargaining agreements." (Doc. #32, at 12). "Plaintiffs' claim that the Unions misrepresented GM's position in 1979 contract negotiations and thereby induced them to enter into the agreements." (Doc. #32, at 13). Plaintiffs specifically assert that "GM, IUE and 801 concerted presented, urged and proposed . . . [the] agreements and modifications [of February 23, 1979] in a manner designed to insure their adoption through the permitted withholding of information necessary to meaningfully inform the 2,000 that their 'bridge agreement' rights would be impaired by an affirmative ratification." (Doc.

(Continued from previous page)

> Chevrolet Motor Division, General Motors Corporation and Local 801, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, October 1, 1979," including without limitation the "Memorandum of Agreement" dated September 18, 1979 contained at pages 40-44 of said booklet; and
>
> (g) the negotiation, manner of adoption, adoption, implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Chevrolet-Moraine Assembly Plant, Chevrolet Motor Division, General Motors Corporation and Local 801, International Union of Electrica [sic], Radio & Machine Workers, AFL-CIO-CLC, October 1, 1979," including without limitation the "Memorandum of Agreement" dated September 18, 1979 contained at pages 42-46 of said booklet.

(Doc. #1, Complaint, at ¶ 15). This statement alone indicates that there is at least some link between Plaintiffs' claims of fraudulent misrepresentation and the various collective bargaining agreements.

#1, Complaint, at ¶ 28). Plaintiffs further allege that "[i]n furtherance of . . . [the] concerted plan of GM, IUE and 801 to . . . substantially confine any consideration of . . . [the] modifications, GM, IUE and 801 concertedly confined the scope of any circulated information regarding the proposals to the explanation and discussion of only the benefits to be derived by the persons then employed by Frigidaire while wholly ignoring and being totally silent with respect to any consequent converse detriment whatsoever to the 2,000 [i.e. the plaintiffs]. . . ." (Doc. #1, Complaint, at ¶ 31). While not *every* claim of fraudulent misrepresentation would be preempted by § 301, based upon the foregoing allegations, the Court concludes that the *Plaintiffs'* claims of fraudulent misrepresentation *are* in fact preempted by § 301.

It cannot be disputed that Plaintiffs' claims of fraudulent misrepresentation all relate to the various collective bargaining agreements. It would be impossible to determine whether the information provided to Plaintiffs by Defendants was false (or insufficient) without analyzing the terms of the various collective bargaining agreements. Basically, the Plaintiffs are asserting that they were not informed (or were misinformed) as to the potential effects of ratification of the Special Memorandum of Understanding of February 23, 1979 and certain other agreements reached on February 23, 1979. The evaluation of whether or not Defendants' representations (and/or concealments) were false "is inextricably intertwined with consideration of the terms of the labor contract[s]." *Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S.Ct. at 1912. *See generally Brown v. Keystone Consol. Indus., Inc.*, 680 F.Supp. 1212, 1218 (N.D. Ill. 1988).

Based upon the foregoing, the Court concludes that Plaintiffs' claims of fraudulent misrepresentation are preempted by § 301 of the LMRA. Accordingly, the Court concludes that Defendants' Motions for Reconsideration must be sustained as they relate to Count Two, and thus, that Plaintiffs' claims of fraudulent misrepresentation shall *not* be remanded to the Montgomery County Court of Common Pleas.

C. *Count Three: Tortious Interference With Contract or Business Relationship*

In Count Three of their Complaint, Plaintiffs assert that Defendants tortiously interfered with certain contractual and/or business relationships. For the reasons briefly set forth below, the Court concludes that the claim of tortious interference set forth in Count Three of Plaintiffs' Complaint is preempted by § 301 of the LMRA.

The Sixth Circuit has concluded that under Ohio law a claim for tortious interference arises when "one who, without a privilege to do so, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship with another, or perform a contract with another. . . . " *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1127 (1981) (quoting *Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 379 N.E.2d 235, 238 (1977)), *reh'g denied*, 668 F.2d 878 (6th Cir.), *cert. denied*, 456 U.S. 991, 102 S.Ct. 2272, 73 L.Ed.2d 1286 (1982). In Count Three of their Complaint, Plaintiffs assert that "[a]s a proximate result of the conduct of the defendant IUE, the defendant Local 801 breached its duties and agreements with the plaintiffs." (Doc. #1, Complaint, at ¶ 75). Plaintiffs further

assert that "[a]s a proximate result of the conduct of the defendant unions, the defendant General Motors did breach its expressed and implied agreements with the plaintiffs." (Doc. #1, Complaint, at ¶ 77). Finally, Plaintiffs assert that "[a]s a proximate result of the conduct of the defendant General Motors, the defendant unions did breach their contracts, fiduciary duties and business relationships with said plaintiffs." (Doc. #1, Complaint, at ¶ 79). The Court will consider each of these allegations seriatim.

Plaintiffs first assert that in order to improve its political position, Defendant IUE intentionally caused Defendant Local 801 to breach its fiduciary obligation to Plaintiffs. Basically, Plaintiffs assert that interpretation of the terms of the various collective bargaining agreements is not necessary to the determination of whether Defendant Local 801 breached duties owed to Plaintiffs under the Union Constitution or Charter. The Court cannot agree with said assertion. Even assuming *arguendo*, that Defendant Local 801's duty of fair representation does arise under an agreement other than the various collective bargaining agreements, the alleged breach of said duty is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S.Ct. at 1912. Defendant Local 801 allegedly breached its fiduciary relationship by promoting changes in Plaintiffs' collective bargaining agreements which were allegedly detrimental to Plaintiffs and by allegedly concealing the fact that said changes were in fact detrimental. An analysis of whether or not Defendant Local 801 breached its duty of fair representation requires an analysis of the terms of the

collective bargaining agreements. Without such an analysis, it would be impossible to determine the impact of Defendant Local 801's actions upon the Plaintiffs. Accordingly, the Court concludes that Plaintiffs' claim that Defendant IUE tortiously interfered with the business and/or contractual relationship between Defendant Local 801 and Plaintiffs is preempted by § 301 of the LMRA.

Plaintiffs next assert that Defendant IUE and Defendant Local 801 intentionally caused Defendant GM to breach its duties to Plaintiffs, including those under "implied agreements" between Defendant GM and Plaintiffs. The Court concludes that Plaintiffs' assertion is without merit as there is *no* relationship between Defendant GM and Plaintiffs separate and apart from that created by the collective bargaining agreement. Plaintiffs' business relationship with Defendant GM is governed by the collective bargaining agreements. Even assuming *arguendo*, that Plaintiffs do possess some "implied" rights, said rights could only have arisen from the employment relationship, and said relationship arises from the various collective bargaining agreements.[3] Further, it must be remembered that Plaintiffs' chief complaint is that GM modified the terms of the collective bargaining agreements. Even assuming, *arguendo*, that some implied

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[3] The Court notes that this is *not* a situation in which the Plaintiffs assert that a duty created by statute has been breached. In situations in which a duty is created by statute as well as by contract, it is not necessary to refer to the contract in order to determine whether said duty has been breached. See *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

agreement, separate and apart from the collective bargaining agreements, existed between Plaintiffs and Defendant GM, it would be impossible to determine whether said agreement was breached by the modification of the terms of the collective bargaining agreements without analyzing and interpreting the terms of the collective bargaining agreements. Based upon the foregoing, the Court concludes that Plaintiffs' claim that Defendant Unions tortiously interfered with the contractual and/or business relationship of Plaintiffs and Defendant GM "is inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S.Ct. at 1912. Accordingly, the Court concludes that said claims are in fact preempted by § 301 of the LMRA, and thus, said claims shall *not* be remanded to state court.

Finally, the Plaintiffs assert that Defendant GM intentionally caused Defendant IUE and Defendant Local 801 to breach their duties to Plaintiffs, including "fiduciary duties and business relationships." Once again, the Plaintiffs argue that the Defendant Unions' duty to represent Plaintiffs fairly arises out of agreements other than the collective bargaining agreement. Even assuming *arguendo* that said argument is correct and that Defendant Unions do owe Plaintiffs duties which do not arise under the various collective bargaining agreements, the Court concludes that Plaintiffs' claims of tortious interference are "substantially dependent upon analysis of the terms" of the various labor contracts. *Id.* at 220, 105 S.Ct. at 1916. Plaintiffs basically assert that the Defendant Unions' actions in promoting the modification of the collective bargaining agreements breached Defendant Unions' duty

of fair representation. The propriety of Defendants' actions simply cannot be determined in the absence of an analysis of the terms of the collective bargaining agreements before and after the modification of February 23, 1979. Based upon the foregoing, the Court concludes that Plaintiffs' claims that Defendant GM tortiously interfered with the contractual and/or business relationship of Plaintiffs and Defendant Unions are "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* at 213, 105 S.Ct. at 1912. Accordingly, the Court concludes that said claims are preempted by § 301 of the LMRA.

Based upon all of the foregoing, the Court concludes that Defendants' Motions for Reconsideration must be sustained as they relate to Plaintiffs' claims under Count Three of Plaintiffs' Complaint, and thus, said claims shall *not* be remanded to the Montgomery County Court of Common Pleas.

D. *Count Four: Negligent or Intentional Infliction of Emotional Distress*

In Count Four of their Complaint, Plaintiffs assert that "the conduct of the defendants, jointly and severally, was negligent and/or intentional and/or reckless and proximately caused severe emotional distress to the plaintiffs." (Doc. #1, Complaint, at ¶ 89). For the reasons briefly set forth below, the Court concludes that Plaintiffs' claims of intentional and/or negligent infliction of emotional distress are *partially* preempted by § 301 of the LMRA.

Under Ohio law, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666, 671 (1983) (quoting Restatement (Second) of Torts § 46(1)(1965)). The Ohio courts further recognize that "[a] cause of action may be stated for the negligent infliction of serious emotional distress." *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 761 (1983) (syllabus). In the interest of clarity, the Court will address each of the possible claims of negligent and/or intentional infliction of emotional distress set forth in Plaintiffs' Complaint individually.[4]

In ¶ 25 of their Complaint, Plaintiffs assert that Defendant GM, Defendant IUE and Defendant Local 801 "proposed modifications of the Local Seniority Agreement of Dec. 10, 1976 and of the Bridge Agreement of December 10, 1976, together with the urging that the same be adopted." If the Plaintiffs are claiming that in proposing this modification, Defendants caused Plaintiffs' emotional distress, the Court concludes that said claim is preempted by § 301 of the LMRA. Such a claim is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Allis-Chalmers Corp.*, 471 U.S. at 213, 105 S.Ct. at 1912. It would be impossible

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[4] The Court notes that it expresses no opinion as to whether Plaintiffs' assertions state a claim upon which relief can be granted under Ohio law. Instead, the Court seeks to determine whether or not Plaintiffs' claims of negligent and/or intentional infliction of emotional distress are preempted by § 301.

to determine whether the Defendants' conduct was outrageous and/or whether Defendants' actions inflicted emotional distress without considering the terms of the existing collective bargaining agreements and the proposed changes to said agreements.

In ¶ 27 of their Complaint, Plaintiffs assert that "[i]n working out and urging the agreements and modifications proposed on February 22, 1979, GM, IUE and 801 withheld from their course of decision-making any good faith consideration and weighing of the rights, interests, and job security considerations of and as to any of . . . [the Plaintiffs], and the . . . rational expectation of . . . [the Plaintiffs]. . . . " If the Plaintiffs are claiming that the Defendants' failure to consider the rights of Plaintiffs caused Plaintiffs emotional distress, the Court concludes that said claim is preempted by Section 301 of the LMRA for said claim is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* at 213, 105 S.Ct. at 1912. Defendants' conduct simply cannot be judged in a vacuum. The emotional impact of Defendants' actions cannot be gauged without analyzing how the terms of the collective bargaining agreements were changed by the modification.

In ¶ 28 of their Complaint, Plaintiffs assert that the Defendants "concertedly presented, urged and proposed . . . [the] agreements and modifications in a manner designed to insure their adoption through the permitted withholding of information necessary to meaningfully inform the . . . [plaintiffs] that their 'bridge agreement' rights would be impaired by an affirmative ratification." If the Plaintiffs are claiming that this alleged

withholding of information by Defendants caused Plaintiffs emotional distress, the Court concludes that said claim must be preempted by § 301 of the LMRA as the evaluation of such a claim "is extricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* It would be impossible to determine what information should have been provided by Defendants without considering the terms of the existing collective bargaining agreements and the proposed changes to said agreements.

In ¶ 30 of their Complaint, Plaintiffs assert that "[p]ursuant to the concerted plan of . . . [Defendants] to substantially confine any consideration of the . . . modifications . . . [to those working at Frigidaire] circulation of the February 21, 1979 issue of '801 News,' . . . was extensively made and accomplished among . . . [those working at Frigidaire] but not among . . . [the plaintiffs]. . . . [and that] such other written notification as occurred to give notice of the special membership meeting and voting . . . was substantially confined to . . . [those working at Frigidaire]." If the Plaintiffs are claiming that Defendants' alleged conduct in concealing the fact that a vote was to be held caused the Plaintiffs emotional distress, the Court concludes that said claim is *not* preempted by § 301 of the LMRA. Regardless of whether the proposed changes to the collective bargaining agreements would have a major or minor effect upon Plaintiffs, it could be argued that Defendants' alleged conduct in denying Plaintiffs the right to participate in decision making caused Plaintiffs emotional distress.

In ¶ 31 of their Complaint, Plaintiffs allege that Defendants circulated information concerning the

benefits of modification to Frigidaire employees but failed to circulate information concerning the potential detriments to Plaintiffs. If Plaintiffs are claiming that Defendants caused Plaintiffs emotional distress by failing to provide said information, the Court concludes that Plaintiff's claim is preempted by § 301 of the LMRA as it is "inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* Once again, it is important to note that it is impossible to determine what information the Defendants should have provided without interpreting the terms of the then-existing cooperative bargaining agreements and the proposed changes to said agreements.

Paragraph 31 of Plaintiffs' Complaint also contains Plaintiffs' assertion that in order to enhance the probability that Plaintiffs would not participate in the ratification vote and to "diminish any comprehensive consideration" of the proposed changes, Defendants "inordinately curtailed the time lapse between the conclusion of their negotiations . . . and a ratification . . . ." If the Plaintiffs are claiming that the Defendants alleged conduct in denying Plaintiffs the right to participate in the ratification decision caused Plaintiffs emotional distress, the Court concludes that said claim is *not* preempted by § 301 of the LMRA. Once again, an analysis of the terms of the collective bargaining agreements and the proposed changes to said agreements is unnecessary to a determination as to whether Defendants' conduct could have caused Plaintiffs emotional distress.

In ¶ 33 of their Complaint, Plaintiffs assert that Plaintiffs were "effectively foreclosed and disenfranchised from any opportunity to persuasively urge their interests

and concerns, from any meaningful participation in either the consideration or vote upon . . . [the] proposed agreements and modifications. . . . " Once again, if the Plaintiffs are claiming that Defendants' conduct in denying them the right to attend the ratification meeting caused Plaintiffs emotional distress, the Court concludes that said claim is *not* preempted by § 301.

In ¶ 35 of their Complaint, Plaintiffs assert that the Defendants caused the submission for approval of the Memorandum of Agreement of September 18, 1979. If the Plaintiffs are claiming that the fact that Defendants proposed a modification of the collective bargaining agreement (and/or the fact that said proposal was adopted) caused Plaintiffs emotional distress, the Court concludes that said claim is preempted by § 301 of the LMRA for the evaluation of said claim "is inextricably intertwined with consideration of the terms of the [various] labor contract[s]." *Id.* It would be impossible to determine whether this change could in fact cause Plaintiffs' emotional distress without interpreting the terms of the collective bargaining agreements as they existed prior to the change and following the change.

In ¶ 36 of their Complaint, Plaintiffs assert that the ratification vote of September 18, 1979, took place "without any notification, access or opportunity having been afforded to any of [the Plaintiffs] . . . to meaningfully participate either in the consideration of such submission for approval or the vote conducted thereon." If the Plaintiffs are claiming that Defendants caused Plaintiffs' emotional distress by denying Plaintiffs the right to fully participate in decision making, the Court concludes that Plaintiffs' claim is *not* preempted by § 301 of the LMRA.

This claim would not require the interpretation of the various collective bargaining agreements.

In conclusion, there is a distinction between claims asserting that the terms of a modification or the failure of a company or Union to adequately disclose the terms of a proposed modification caused a worker emotional distress, and the claim that the failure to allow a worker to participate in decision making caused said worker emotional distress. The former claims simply cannot be analyzed without interpreting the terms of the existing and proposed collective bargaining agreements; same are, therefore, preempted by § 301 of the LMRA. The latter type of claim is not dependent upon an interpretation of the terms of the existing and proposed collective bargaining agreement; same are, therefore, not so pre-empted. Regardless of whether the impact of a particular vote is large or small, the fact that one is deliberately excluded from participating in said vote could be distressing and constitute emotional distress.

Based upon the foregoing, the Court concludes that ¶¶ 25, 27, 28, 35, and that portion of ¶ 31 relating to the circulation of information contain claims which are "inextricably intertwined with consideration of the terms of the [various] labor contract[s]", and thus are preempted by § 301 of the LMRA. Said claims will *not* be remanded to state court. The Court concludes that the remainder of the claims for negligent and/or intentional infliction of emotional distress contained within Plaintiffs' Complaint (i.e. those contained in ¶¶ 30, 33, 36 and that portion of ¶ 31 relating to the denial of Plaintiffs' right to participate in the ratification vote) are *not* preempted by § 301 and, accordingly, will be remanded to state court.

Accordingly, the Court concludes that Defendants' Motions for Reconsideration must be sustained in part and overruled in part as they relate to Count Four. Those claims contained in ¶¶ 25, 27, 28, 35, and that portion of ¶ 31 relating to the circulation of information shall *not* be remanded; the remainder of the claims contained in Count Four (as set forth above) shall be remanded.

III. CONCLUSION

In sum, the Court has concluded that Defendants' Motions for Reconsideration must be and hereby are sustained as they relate to Count Two and Count Three of Plaintiffs' Complaint and as they relate to ¶¶ 25, 27, 28, 35 and that portion of ¶ 31 relating to the circulation of information of Count Four of Plaintiffs' Complaint. Counts Two and Three and that portion of Count Four will *not* be remanded to state court. The Court has further concluded that Defendants' Motions for Reconsideration must be and hereby are overruled as they relate to the remainder of Count Four of Plaintiff's Complaint (¶¶ 30, 33, 36 and a portion of #31). Those portions of Count IV will be remanded to state court. In addition, the Court has concluded that the Court's Decision and Entry sustaining the Motion of Defendant Unions for Summary Judgment (Doc. #19) must be vacated as it relates to Count Two of Plaintiff's Complaint.

Finally, after due consideration, the Court has concluded that Plaintiffs' Motion for Costs (Doc. #11) must be and hereby is overruled in its entirety. This Court simply cannot conclude that an award of costs would be just in this case. The vast majority of Plaintiffs' claims

were properly removed. Basically, only three and one-half paragraphs out of Plaintiffs' entire Complaint were remanded. It would be unfair to penalize Defendants for their inability to sever said paragraphs from the remainder of the claims which were properly removed.

IV. FURTHER PROCEDURES ORDERED OF THE DEFENDANTS

The Defendants have asserted that those claims preempted by § 301 of the LMRA (i.e., those found in Count Two, Count Three and that portion of Count Four related to ¶¶ 25, 27, 28, 35 and a portion of ¶ 31) are barred by the six-month statute of limitations established by § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The Court hereby grants Defendants twenty (20) days from the entry of this decision to file a properly documented motion for summary judgment to that effect.

The above stated motion for summary judgment will be briefed according to Local Rule of Court 4.0.2. Plaintiffs shall have twenty days from date of service to file any memoranda contra said motion. Any reply memoranda should be filed within seven days of the memoranda contra.

BRIDGE AGREEMENT

WHEREAS, Local 801 IUE-AFL-CIO-CLC and the International Union is the legal bargaining agent for employes of Frigidaire Division of General Motors as described in the certification from the National Labor Relations Board, and

WHEREAS, General Motors Corporation has determined that a product line formerly produced under the direction of Frigidaire Division is being produced by a new division resulting from an organization restructuring named Delco Air Conditioning Division, both of which divisions are hereinafter referred to as management, and

WHEREAS, management acknowledges the rights of Local 801 as a collective bargaining agent of certain employes of both Frigidaire Division and Delco Air Conditioning Division.

NOW THEREFORE, the management and the union by virtue of the execution of this document hereby agree to supplement, as hereinafter set forth, certain provisions of the Local Seniority Agreements and other local agreements at the Frigidaire Division and Delco Air Conditioning Division. The parties further agree to apply the representation provisions of the National Agreement between the IUE-AFL-CIO-CLC and General Motors Corporation to each division as hereinafter clarified by this agreement.

Seniority

I. A. All represented employes of Frigidaire Division on the active payroll as of the effective date of

this agreement will be identified for seniority purposes, by a process commonly referred to as "red-circling."

B. Such identified employes will be offered opportunities to move to clearance group job openings or to appropriate skilled trades assignments in the Delco Air Conditioning Division as these openings occur. Movement to these openings will be accomplished in seniority order providing the employe is capable of performing the clearance group or skilled trades job opening. If a "red-circled" Frigidaire Division employe declines the opportunity to move to an opening in Delco Air Conditioning, he or she will continue as a Frigidaire Division employe until such time as the last "red-circled" employe is scheduled for movement to Delco Air Conditioning Division, except that an employe who has declined such first opportunity to move may make one application, on forms provided by the Company, to be reinstated in proper seniority order for a subsequent opening. Employes who have declined previous moves will be offered one last chance to elect to move. If these employes elect not to move, they will no longer be entitled to a job in Delco Air Conditioning Division as a matter of right.

C. Such movements will continue until such time as all "red-circled" employes will have moved or declined to move.

D. After all "red-circled" employes have moved or declined to move, new openings in Delco Air Conditioning will be filled under the hiring practices established by Delco Air Conditioning Division.

II. A. All represented employes of Delco Air Conditioning Division having valid seniority dates at the time of the signing of this memorandum will also be identified by the "red-circling" procedure for seniority purposes.

B. In the case of possible future reductions in force in Delco Air Conditioning Division involving "red-circled" employes, they will be laid off in line with seniority and will be governed by existing agreements dealing with Supplemental Unemployment Benefits and applicable governmental regulations dealing with Unemployment Compensation.

C. In the event that such laid-off employe is a "red-circled" employe, he or she will have the right to apply for a job opening at Frigidaire Division. Such employes will be transferred to fill such openings, giving due consideration to the employe's capability to perform the work. If there are no openings, he or she may apply to displace a lesser seniority Frigidaire employe working in the clearance group or in appropriate skilled trades jobs at Frigidaire Division. The applicant must be capable of performing the work and must file the application to displace within thirty (30) days following the first day of layoff from Delco Air Conditioning Division or upon exhausting Unemployment Compensation or Supplemental Unemployment Benefits. Management will place the applicant in line with his or her seniority and capability within three weeks following receipt of the application. These provisions in no way supersede the employe's rights for Area Hiring consideration at other divisions.

D. The rate of pay for such employes will be at the regular appliance rate instead of the new-hire rate (25¢ less).

E. The Delco Air Conditioning "red-circled" employes will consist of those employes on the payroll in the division on the date this memorandum is signed.

F. Frigidaire Division "red-circled" employes who move to Delco Air Conditioning Division subsequent to the signing of this Agreement will also be accorded "red-circled" status in Delco Air Conditioning Division as limited in Paragraph H below.

G. The "red-circled" employes of Delco Air Conditioning Division will continue to have these rights described herein until such time as they retire, quit, or are otherwise terminated.

H. Frigidaire Division "red-circled" employes who move to Delco Air Conditioning Division subsequent to the signing of this agreement and are accorded "red-circled" status in Delco Air Conditioning will retain such status and the seniority benefits appertaining thereto until all Frigidaire "red-circled" employes have been transferred to Delco Air Conditioning Division as provided for under Paragraph I., B. of this agreement and 900 employes are newly hired by Delco Air Conditioning Division at which time "red-circled" status will cease to exist for such employes.

Representation

The International Union of Electrical Workers and its Local 801 have been the legally certified bargaining agent for certain production and maintenance workers in the

North Plant and the South Plant which now constitute the manufacturing facilities of Delco Air Conditioning Division. Additionally, they have also been the legally certified bargaining agent for certain production and maintenance workers in Plants #2 and #3 which now constitute the manufacturing facilities of Frigidaire Division. Each Division recognizes that the IUE and Local 801 continue to be the legally certified bargaining agent of employes in each of those plants falling under each Division's jurisdiction.

To maintain the integrity and efficiency of the bargaining relationship between Local 801 and both the Frigidaire and Delco Air Conditioning Division, the parties agree, for bargaining purposes, to apply the Representation Section of the GM-IUE National Agreement in each of the two divisions consistent with Paragraph 4 of the Special Agreement dated November 20, 1971 and Paragraph 1 of the Appliance Agreement dated November 19, 1973. Current implementation of the provisions of the Representation Section shall be under the President, Chairman and Executive Board of Local 801.

Realignment of zones and districts as required by the National Agreement will be completed within sixty (60) days following the effective date of this Bridge Agreement under the terms of the Memorandum of Understanding attached hereto.

In witness whereof, the parties hereto have caused their names to be subscribed by their duly authorized officers and representatives of this the 10th day of December, 1976.

LOCAL 801 – IUER-MW-AFL-CIO-CLC

Cassel V. Palmer
Wesley H. Garrison, Sr.
Clyde H. Johnson
William S. Jankovich
William R. Walters
Allen C. Robertson

DELCO AIR CONDITIONING DIVISION, GMC

David L. Drury
J.T. Reynolds
D.L. Webster
R.E. Burke
L.S. Benham

FRIGIDAIRE DIVISION, GMC

T.J. Tatham
T.H. Szromba, Jr.
J.W. Evans
T.D. Nichols
R. Kelhoffer
T.M. Hiegel

Subject to approvals by:

INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO-CLC

William R. Pierce

Date: 2/16/77

GENERAL MOTORS CORPORATION

Edward A. Hodge

Date: 2/16/77

Special Memorandum of Understanding between General Motors Corporation and the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC and its Local 801

WHEREAS, General Motors will cease household appliance production at its Frigidaire Division, and,

WHEREAS, it is anticipated that Chevrolet Motor Division will commence the manufacture of light trucks and engines in separate plants in the buildings where the Frigidaire operations were located and,

WHEREAS, there is a need for an orderly shutdown of operations under the direction of Frigidaire and an orderly startup of operations under the direction of Chevrolet and,

WHEREAS, employes of Frigidaire will continue to be employed to complete Frigidaire production requirements and, to the extent practicable, remove, clear and modify existing equipment and install new equipment under the direction of either Frigidaire or Chevrolet, and,

WHEREAS, the Union is the certified bargaining representative for the above mentioned employes, and,

WHEREAS, the Union and the Corporation recognize the desirability of clarifying the status of the employes to be laid off from Frigidaire Division,

NOW, THEREFORE, it is agreed that:

I. The Local Seniority Agreement dated December 10, 1976 is hereby cancelled and superseded by the provisions of this Agreement.

II. To provide for an orderly shutdown of Frigidaire operations, employes will be laid off as their job assignments are completed as determined by Management.

This procedure will be followed until all finished product inventory requirements are manufactured. At the time that only service parts requirements are scheduled for production, all Non-Interchangeable Occupational Group jobs and those Clearing Group jobs which are critical by reason of skill requirements, quality of product and/or product safety will be so identified. The critical Clearing Group jobs will be listed by mutual agreement prior to March 18, 1979, by a committee comprised of two members of the local union and two members of the local management. Employes assigned to those jobs will remain as long as they are needed. Within ten (10) working days following the completion of production of finished product inventory requirements, clearing group employes not designated as critical will be employed on a seniority order basis, provided they are capable of doing the jobs.

III. In the event Management has a need to recall any employes to perform productive operations prior to complete cessation of operations, recall will be accomplished in the following manner:

A. Non-Interchangeable Occupational Group jobs and those Clearing Group jobs which have been identified as critical in II above will be filled by

recalling employes who have last previously performed them. If no such employes are available, Management will recall the oldest seniority employes laid off provided they are capable of performing the work.

B. Clearing Group jobs which have not been identified as critical will be filled by recall of the oldest seniority employes laid off provided they are capable of performing the work.

IV. Any employe whose seniority at the Frigidaire Division is unbroken at the point at which a need for production and maintenance employes exists at the Chevrolet Motors Division plants shall have his seniority transferred to one of the Chevrolet – Dayton, Ohio plants at the time he commences work at such plant. The seniority of an employe which is so transferred shall be the full seniority he had on record at the Frigidaire Division.

V. An employe whose seniority is transferred to a Chevrolet – Dayton, Ohio plant from the Frigidaire Division, pursuant to Paragraph IV above, shall be offered employment in accordance with the following procedure:

A. An employe shall be offered employment at either the assembly plant or the engine manufacturing plant as openings in those respective plants occur on a job he is capable of performing in the judgment of Management in accordance with his seniority

standing at the former Frigidaire Division.

B. Employes who are offered employment at either of the Chevrolet plants and who refuse such employment at such plant, will have no further rights to employment at either Chevrolet plant, and their Frigidaire seniority shall be broken pursuant to Paragraph 34(d) of the National Agreement.

VI. By reason of the foregoing the Corporation will continue to recognize the Union as representative of the production and maintenance employes who will be employed in separate bargaining units by Chevrolet – Dayton in separate truck and engine manufacturing plants.

VII. This "Special Memorandum of Understanding" shall become effective February 23, 1979, and is negotiated to apply solely to the facts as they exist in the instant situation, and none of the provisions herein constitute a precedent for the disposition of future positions of the parties.

VIII. The parties agree that no liability of any kind shall result from the application of these provisions.

IX. This agreement is subject to ratification by Local Union 801, IUE, and will become effective on February 23, 1979, provided notice of ratification is received not later than February 23, 1979.

IN WITNESS WHEREOF, the parties hereto have caused their names to be subscribed by their duly authorized officers and representatives the year first above written.

INTERNATIONAL UNION, IUE
ss/ _____

GENERAL MOTORS CORPORATION
ss/ _____

LOCAL UNION 801, IUE-AFL-CIO-CLC
ss/ _____

FRIGIDAIRE DIVISION, GMC
ss/ _____

CHEVROLET MOTOR DIVISION, GMC
s/ _____

EXCERPTS FROM PETITIONERS' STATE COMPLAINT

* * *

15. The claimed breaches as well as the tortious interference with the plaintiffs rights, contracts and employment, the intentional and negligent infliction of emotional distress upon the plaintiffs, fraul and deceit, involve and concern said defendants' wrongful conduct in:

(a) the implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Frigidaire Division, General Motors Corporation and Local 801, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, December 10, 1976" including without limitation the "Bridge Agreement" dated December 10, 1976 contained at pages 46-52 of said booklet;

(b) the implementation and enforcement of the National Agreement of December 10, 1976;

(c) the negotiation, manner of adoption, adoption, implementation and enforcement of "Special Memorandum of Agreement between General Motors Corporation and the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC and its Local 801" dated February 23, 1979;

(d) the negotiation, manner of adoption, adoption, implementation and enforcement of that "Memorandum of Agreement" between GM and IUE and 801, dated February 23, 1979, which in part provides that all employees who become laid off from Frigidaire "will

have the same layoff status as if they had been laid off from Delco Air Conditioning Division except," etc.;

(e) the implementation and enforcement of the National Agreement of September 18, 1979;

(f) the negotiation, manner of adoption, adoption, implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Chevrolet-Moraine Engine Plant, Chevrolet Motor Division, General Motors Corporation and Local 801, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, October 1, 1979," including without limitation the "Memorandum of Agreement" dated September 18, 1979 contained at pages 40-44 of said booklet; and

(g) the negotiation, manner of adoption, adoption, implementation and enforcement of those agreements contained in a booklet entitled "Local Agreement between Chevrolet-Moraine Assembly Plant, Chevrolet Motor Division, General Motors Corporation and Local 801, International Union of Electrica, Radio & Machine Workers, AFL-CIO-CLC, October 1, 1979," including without limitation the "Memorandum of Agreement" dated September 18, 1979 contained at pages 42-46 of said booklet.

16. In all respects, all of the conduct referred to in ¶ 15, emanated from a wrongful course of concerted and conspiratorial dealing wherein General Motors Corporation, while knowing otherwise, placed IUE and Local 801 in fear that General Motors might not recognize them as the collective bargaining agent at the converted plants, and induced willingness and action on the part of IUE

and Local 801 to go along with General Motors' demand for the abrupt abrogation of the bridge agreement seniority rights of the 2,000 *vis á vis* the 3,500 in order to assure General Motors' recognition of them and not the UAW at the converted plants.

* * *

25. However, during February, 1979, GM, IUE and 801 acted together to cause to be presented to said 3,500 red-circled pre-1977 Frigidaire employees who had continued in their jobs at Frigidaire and to said approximately 2,500 (hereinafter "2,500") post-1976 newly hired Frigidaire employees, and without regard to the 2,000 red-circled pre-1977 Frigidaire employees who had moved to jobs at Delco Air under the red-circling provisions of the Bridge Agreement – proposed modifications of the Local Seniority Agreement of December 10, 1976 and of the Bridge Agreement of December 10, 1976, together with the urging that the same be adopted. They did so in an unlawful, arbitrary and discriminatory manner.

* * *

27. The essence and implied obligations of the Bridge Agreement of December 10, 1976 were the preservation and perpetuation of the acquired and accumulated Frigidaire seniority and order of Frigidaire seniority standing with respect to each continuing employer-employee relationship between GM and each of those who would become an ex-Frigidaire Division employee. In working out and urging the agreements and modifications proposed on February 22, 1979, GM, IUE and 801 withheld from their course of decision-making any good

faith consideration and weighing of the rights, interests, and job security considerations of and as to any of said 2,000, and the aforesaid rational expectation of said 2,000 who thereby had been induced to elect to become ex-Frigidaire Division employees between December 10, 1976 and February 22, 1979. Said concerted course of dealing among GM, IUE and 801 in that regard, including their undertaking thus to limit such preservation and perpetuation of Frigidaire seniority to the lesser senioritied 6,000, while applying such preservation and perpetuation to all 8,000 with respect to the GM Delco Air Conditioning Division plants, constitutes a breach by GM, IUE and 801 of the implied obligations of the Bridge Agreement, and of the intendment, spirit and purpose underlying the Bridge Agreement heretofore described in ¶ 21(a) and (b), for equitable and equal treatment based on acquired and accumulated Frigidaire seniority and the benefits thereafter to arise therefrom for each ex-Frigidaire employee as a continuing employee of GM, vis á vis each other such ex-Frigidaire employee.

28. GM, IUE and 801 concertedly presented, urged and proposed said agreements and modifications in a manner designed to insure their adoption through the permitted withholding of information necessary to meaningfully inform the 2,000 that their "bridge agreement" rights would be impaired by an affirmative ratification.

29. The agreements and modifications of February 23, 1979 among GM, IUE and 801 and affirmed and/or reaffirmed among them on September 18, 1979, provide that upon the conversion of the operations as the Moraine plants from Frigidaire Division's home appliance related manufacturing operations to Chevrolet Motor Division's

motor vehicle related manufacturing operations, that as jobs are to be filled at the Chevrolet plants the Frigidaire employees who then are still laid off from the shut-down of Frigidaire, on a job capability basis, are to be transferred into those jobs together with their full seniority on record at the Frigidaire Division. Said agreements and modifications utilize the Bridge Agreement (Appendix "1") in the manner heretofore described as a vehicle to that end. Said agreements and said modifications among GM, IUE and 801 are tantamount to and should be deemed to have effectuated the contractual substitution by GM, IUE and 801 of the Chevrolet Motor Division and its Moraine plants and jobs for the Frigidaire Division and its Moraine plants and jobs with respect to and for purposes of the Bridge Agreement and its "bumping" rights, procedures and provisions. Accordingly, GM, IUE and 801 should be deemed thereby to be, and are, estopped from denial to said 1,000 laid-off persons who had transferred from Frigidaire to Delco Air the same contractual right to "bump-in" to appropriate jobs at said Chevrolet Division plants as the Bridge Agreement initially provided to them with respect to appropriate jobs at Frigidaire. The aforedescribed concerted by-passing of said 1,000 still laid-off persons from the red-circled 2,000 in disregard of their mostly greater Frigidaire seniority over that of the red-circled 3,500 and newly hired 2,500, has occurred in breach of the aforesaid so effectuated contractual substitution by GM, IUE and 801 of Chevrolet for Frigidaire as to the Bridge Agreement and its "bumping" provisions.

30. Pursuant to the concerted plan of GM, IUE and 801 to substantially confine any consideration of the said

modifications which they were urging be approved and adopted, to said red-circled 3,500 and to said newly hired 2,500, and therefore, necessarily to the arbitrary and discriminatory exclusion of said red-circled 2,000, circulation of the February 21, 1979 issue of "801 News," a copy of which comprises Appendix "2" attached hereto and made a part hereof, was extensively made and accomplished among said 3,500 and said 2,500, but not among said 2,000. Pursuant, also, to said concerted plan of GM, IUE and 801 to so substantially confine any such consideration, such other written notification as occurred to give notice of the special membership meeting and voting which they concertedly planned and scheduled to take place on February 22, 1979, was substantially confined to said 3,500 and said 2,500, as well.

31. In furtherance of said concerted plan of GM, IUE and 801 to so substantially confine any consideration of said modifications, GM, IUE and 801 concertedly confined the scope of any circulated information regarding the proposals to the explanation and discussion of only the benefits to be derived by the persons then employed by Frigidaire while wholly ignoring and being totally silent with respect to any consequent converse detriment whatsoever to the 2,000, including without limitation that heretofore described in ¶ 26(e). Said concertedly confined scope is exemplified by said February 21, 1979 issue of "801 News". As concertedly contemplated by GM, IUE and 801, the direct and forseeable result of the complete absence of any indication in the circulated information that would tend to alert anyone that the Frigidaire seniority standing of the red-circled 2,000 would be by-

passed for purposes of filling the jobs at the contemplated Chevrolet plants by approval and adoption of the proposed agreements and modifications, or that there would be any other consequent converse detriment whatsoever to any of the red-circled 2,000, was to enhance the probability that participation in the vote be substantially confined to the persons then employed at Frigidaire. As hereinafter related, such was the result. To that same end, as well as to diminish any comprehensive consideration of said proposals, GM, IUE and 801 inordinately curtailed the time lapse between the conclusion of their negotiations which occurred on or about February 20, 1979, and a ratification that was required to be concluded so as to meet the requirement of a notice to GM of such ratification no later than February 23, 1979.

32. Ostensibly, the registration and voting procedures as set forth in said February 21 issue of "801 News" were such that any member of 801 by virtue of that membership was entitled to gain admission and endeavor to persuasively voice his views and concerns at said special membership meeting, and to register to vote and to vote a ballot to accept or reject the proposed agreements and modifications. However, the intended effect of such imposed time curtailment and such total absence from the circulated information and explanation of anything that would indicate that the rights of anybody other than the persons then employed at Frigidaire were in any way involved in the proposed agreements and modifications, together with the aforedescribed substantially confined circulation of said issue of "801 News" and other written notification, was that substantially the 801 members who attended, registered and voted at said

special membership meeting were from among those persons that comprised said red-circled 3,500 and said newly hired 2,500.

33. Consequently, as a practical matter said imposed time curtailment and concerted confinement of the scope and distribution of the circulated information and explanation permitted neither an informed nor meaningful deliberation or vote upon said proposed agreements and modifications either by the substantially absent red-circled 2,000 or even by those of the 3,500 and 2,500 who were present and who voted. And as to the 2,000, they were thereby effectively foreclosed and disenfranchised from any opportunity to persuasively urge their interests and concerns, from any meaningful participation in either the consideration or vote upon said proposed agreements and modifications, as well as from any opportunity to first learn of the proposals' adverse implications as to them and thereupon to persuasively urge a fair-minded consideration of their interests. The concerted implementation of those modifications by GM, IUE and 801 has served to undermine and subvert the great reliance which persons comprising the 2,000 had placed on the equitable and equal preserving, perpetuating and honoring for all alike of the red-circled 5,500 of their Frigidaire seniority, which it was the implied obligation and underlying intendment, spirit and purpose of the Bridge Agreement to preserve, perpetuate and honor for all vis á vis one another upon transferring out of Frigidaire, and which had been a material inducement in the 2,000 having elected to accept transfer offers into Delco Air.

34. As a result of an overwhelming majority of those of said 3,500 and 2,500 who attended said special membership meeting having marked a "Yes" box upon ballots comprised of "Yes" and "No" boxes, the so presented, urged and proposed agreements and modifications were so approved. Said so approved agreements and modifications have since that time been known as the "Special Memorandum of Understanding of February 23, 1979" and "certain other agreements reached on February 23, 1979."

35. On or about September 18, 1979, GM, IUE and 801 concertedly acted to and did perpetuate the arbitrary and discriminatory breach of the duty of IUE and 801 of fair representation with respect to the 2,000 and the breach by GM, IUE and 801 of the implied obligations and underlying intendment, spirit and purpose of the Bridge Agreement of December 10, 1976, heretofore described in ¶ 21. They did so by causing a submission for approval by a majority vote of said 3,500 and said 2,500 of a contractual affirmance and/or reaffirmance which GM, IUE and 801 concertedly had worked out in the form of a "Memorandum of Agreement" to be dated September 18, 1979, affirming and/or reaffirming and implementing under the auspices of the 1979 National Agreement between IUE and GM and as part of the 1979 Local Agreement between 801 and GM with respect to the Chevrolet-Moraine Engine Plant and the Chevrolet-Moraine Assembly Plant of the Chevrolet Motor Division, the provisions and effect of said "Special Memorandum of Understanding of February 23, 1979" and said "certain other agreements reached on February 23, 1979." This, including the confinement of the Frigidaire seniority and

order of seniority standing of ex-Frigidaire employees for purposes of the assignment of employees to classifications and occupational groups at the Chevrolet-Moraine Engine Plant and at the Chevrolet-Moraine Assembly Plant to such Frigidaire seniority and standing of only the red-circled 3,500 and the newly hired 2,500, with the consequent by-passing for such purposes of such Frigidaire seniority and standing of said greater senioritied red-circled 2,000.

36. Such confined submission for approval and said so voted approval occurred on or about September 18, 1979, without any notification, access or opportunity having been afforded to any of said 2,000 to meaningfully participate either in the consideration of such submission for approval or in the vote conducted thereon.

37. By virtue of the aforedescribed course of dealing, GM, IUE and 801 have concertedly effectuated an arbitrary, discriminatory and contract-breaching expropriation and abrogation of Frigidaire seniority rights and entitlements that should flow therefrom, as to the minority comprised of the red-circled 2,000 ex-Frigidaire employees. This GM, IUE and 801 have combined to do in the course of extending arbitrary, discriminatory and contract-breaching preferential treatment to the majority comprised of said 3,500 and said 2,500 mostly lesser senioritied ex-Frigidaire employees. And, without any such due consideration or weighing, they have extended to said Chevrolet plants the lesser Frigidaire seniority of the latter while precluding therefrom the greater Frigidaire seniority of the former.

* * *

39. During approximately February, 1980, or in any event shortly after the recall to Delco Air of some of said previously transfer declining persons from among the red-circled 3,500 [Frigidaire employees] instead of such recall being from those of the 2,000 [red-circled] who remained laid-off by Delco Air, inquiry was made of the president of 801 by one or more of the red-circled 2,000 as to the reason for such preference. That is, as to the reason for such preference to those ex-Frigidaire employees who while having greater Frigidaire seniority had previously declined to transfer, instead of recalling an equally skilled though lesser senioritied ex-Frigidaire employee who had accepted the offered opportunity to transfer to Delco Air and who Delco Air subsequently laid off. The responses of the president of 801 to such inquiry made within the course and scope of his capacity as such president and within apparent authority granted him by IUE and 801 to make, was that it was because they are all considered Delco Air employees. He in the same capacity and with the same apparent authority subsequently responded to a similiar inquiry that the reason was that "we can't leave our brothers with seniority out on the street."

40. Consistent with the foregoing impression which he gave that the Frigidaire seniority standing of each of the then 5,500 ex-Frigidaire employees who had been given red-circled status by the Bridge Agreement of December 10, 1976 was being fully recognized, preserved and perpetuated equitably and equally as to each based on his order of Frigidaire seniority vis á vis one another

for recall purposes, the president of 801 on various occasions from August, 1979 at least into August, 1980 repeatedly responded to inquiries from persons among the red-circled 2,000 [Delco workers] that the jobs at the Chevrolet plants definitely would be filled on the basis of the order of the Frigidaire seniority of each one of the ex-Frigidaire employees who would be still in a laid-off condition when those Chevrolet plants were ready to commence operations, including any of the red-circled 2,000 that had transferred to Delco Air and then would be still in a laid-off condition. On occasion he emphasized his response to that effect by displaying and permitting to be read a multi-paged document comprised of communications involving IUE, 801 and federal governmental authority to the effect that 801 was required to cause such participation. On occasion the response included statements by the president of 801 to the effect that the union was founded on seniority, that it has been run on seniority and that such was the way it would continue to be and that the seniority acquired and accumulated at Frigidaire "rules," and that the laid-off of the 2,000 had nothing to worry about as they accordingly would so participate fully in the Chevrolet jobs. Said responses were given by said president of 801 in the course and scope of his capacity as such president and within apparent authority to do so granted him by IUE and 801.

41. During the period said president was making those responses, he and his 801 officers and staff in the course of their said capacities and authority to do so from IUE and 801 were actively encouraging persons among the red-circled 3,500 and the newly hired 2,500 to muster

their forces to counter ongoing petitioning endeavors by certain of the red-circled 2,000 for an express formal resolution to the effect that the laid-off among said 2,000 would be included in the pool of ex-Frigidaire employees from which the Chevrolet plant job openings would be filled. And, such was consistent with his subsequent acknowledgment of the IUE and 801 political reasoning given by him in his capacity as such president and with the apparent authority from IUE and 801 to give, to the effect that since the laid-off ex-Frigidaire employees who had transferred from Frigidaire to Delco Air represented only some 1,000 union members and those ex-Frigidaire employees that were laid-off upon the shut-down of the Frigidaire Division represented some 6,000, the union's position was to fill the Chevrolet jobs only from the 6,000.

* * *

43. The National Agreement of December 10, 1976 was entered into between the Delco Products Division (Kettering, Ohio), Delco Air Conditioning Division (Dayton and Moraine, Ohio), Delco Products Division (Rochester, New York), Packard Electric Division (Warren, Ohio) and Delco-Remy Division (New Brunswick, New Jersey), of General Motors Corporation, collectively referred to therein as the "Corporation," and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local Unions 717 (Warren, Ohio), 755 and 801 (Dayton, Ohio), 509 (Rochester, New York), and 416 (New Brunswick, New Jersey), collectively referred to therein as the "Union," the same to continue at least through September 14, 1979.

44. Said National Agreement of 1976 was superseded by the National Agreement of September 18, 1979, the parties to which are General Motors Corporation without specification of any divisions and referred to therein as the "Corporation," and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC without specification of any local unions and referred to therein as the "Union."

45. Paragraph 59 of said 1976 National Agreement and paragraph 59 of said 1979 National Agreement, each being under that group of provisions entitled "Establishment of New Plants," respectively provide without reference to any particular division, that for the first 24 months after production begins in a new plant:

(a) that the Corporation will give preference to the applications of laid-off employees having seniority in other plants;

(b) that such preference shall operate over applications of individuals who have not previously worked for the Corporation;

(c) with the proviso that "their previous experience in the Corporation shows that they can qualify for the job";

(d) that when so employed, such employees would have the status of temporary employees in the new plant; and

(e) that such employees would "retain their seniority in the plant where originally acquired until broken" in accordance with the seniority rules set forth in said respective National Agreements. The seniority rules

so referred to provide that seniority will be broken for any of the therein listed reasons. Recall or transfer of a laid-off employee to another plant of either the same division or another division is not included among any of the so listed reasons by which seniority would be broken.

46. In the course of so providing that existing laid-off GM employees having seniority in other plants are to have preference over individuals who have not previously worked for GM, and that such seniority shall be retained, it necessarily becomes contractually incumbent on the part of GM upon so drawing from its pool of laid-off employees to do so in accordance with the seniority standing of those respective laid-off employees vis á vis one another to the extent that same may be accomplished within the contractual proviso that their previous GM experience shows that they can qualify for the job at the new plant. The some 1,000 still laid-off ex-Frigidaire employees from the red-circled 2,000 by virtue of their previous GM experience so qualified for the jobs at the new Chevrolet-Moraine plants.

47. The aforedescribed concerted by-passing by GM, IUE and 801 of the some 1,000 persons still laid-off from the red-circled 2,000 in favor of the red-circled 3,500 and the newly hired 2,500, in disregard of the mostly greater Frigidaire seniority of the former over that of the latter for the jobs at the new Chevrolet plants, has occurred in breach of the express and implied contractual obligations imposed by paragraph 59 of said 1976 National Agreement and paragraph 59 of said 1979 National Agreement. The hardened positions of GM, IUE and 801 in such concerted by-passing of said 1,000, as manifested by their aforedescribed course of dealing with

respect to filling the jobs at the new Chevrolet plants, would have rendered the submission of any formal application by any of said 1,000 for any of such jobs a vain, useless and futile act, and excuses any lack of such formal application.

48. Paragraph 60 of said 1976 National Agreement and paragraph 60 of said 1979 National Agreement, each being under said group of provisions entitled "Established of New Plants" respectively require that the Corporation and the International Union engage "in an effort to negotiate an equitable solution" upon the transfer of major operations between plants. If the said conversion of the Frigidaire Moraine plants to Chevrolet Moraine plants comes within the scope and purview of either of said "transfer of major operations" provisions, then said concerted by-pass by GM, IUE and 801 of said 1,000 still laid-off persons from the red-circled 2,000 also constitutes a branch of the obligations of GM and IUE under each such paragraph 60 to have engaged "in an effort to negotiate an equitable solution," the same being instead arbitrary and discriminatory.

* * *

73. The conduct of the defendants as aforesaid constitutes breach of the fiduciary obligation owed by IUE and 801 to the aforesaid plaintiffs as members in good standing of said unions and the corresponding fiduciary rights of said plaintiffs as such members and under pertinent labor agreements that otherwise would have subsisted for the benefit of said plaintiffs numbered 1 through 342 and 601 through 747.

74. The conduct of the defendant IUE with respect to and with the defendant Local 801 as aforesaid was done without lawful right, intentionally, willfully, maliciously and knowingly and was designed to cause denials of said plaintiffs' rights and benefits under the duties and agreements existing between the defendant unions and the plaintiffs in order to wrongfully further the political position of the defendant IUE at the expense of the plaintiffs.

75. As a proximate result of the conduct of the defendant IUE, the defendant Local 801 breached its duties and agreements with the plaintiffs.

76. The conduct of the defendant unions (Local 801 and IUE) as aforesaid was done without lawful right, intentionally, willfully, maliciously, knowingly, and was designed to accommodate, enhance and participate in the denial of rights and benefits of the plaintiffs which had existed, arising both out of the express provisions of the contracts existing between General Motors and the employees (plaintiffs) of General Motors and under implied agreements existing between General Motors and the plaintiffs under the factual circumstances and law applicable thereto.

77. As a proximate result of the conduct of the defendant unions, the defendant General Motors did breach its expressed and implied agreements with the plaintiffs.

78. The conduct of the defendant, General Motors, as aforesaid was done without lawful right, intentionally, willfully, maliciously, knowingly and was designed to cause the defendant unions to breach their contracts,

fiduciary duties and business relationships with plaintiffs, under the threat of impairing and terminating the defendant unions' relationship with the defendant General Motors.

79. As a proximate result of the conduct of the defendant General Motors, the defendant unions did breach their contracts, fiduciary duties and business relationships with said plaintiffs.

80. As a direct result of said violations of the rights of said plaintiffs through said tortious interference, invasion and conspiracy, the same fact of damage, injuries and damages have been sustained by the plaintiffs as heretofore referred to.

81. As a further direct result of said violations of their rights, each of the plaintiffs referred to heretofore and those now on layoff has suffered lost wages in the future, and has and will to a reasonably psychological certainty continue to suffer and sustain an appreciable diminishment in his or her self-esteem and dignity, and has endured and to a reasonable psychological certainty will continue to endure severe emotional distress, anxiety and mental anguish, as will each of the still employed plaintiffs upon his becoming laid off.

82. Each of the plaintiffs referred to as a spouse of one or another of the plaintiffs, as a direct result of the adverse effects upon the income, self-esteem and dignity and of said emotional distress, anxiety and mental anguish which have already or will yet commence, and to a reasonable psychological certainty will continue to be so suffered, sustained and endured by said spouse's husband or wife, each such spouse claims a loss of services,

society and companionship with respect to each such spouse's husband or wife.

83. To the full extent permitted by law each of the plaintiffs referred to heretofore should have money judgment against defendants GM, IUE and 801, jointly and severally for such of the impact and injuries aforedescribed, as each such plaintiff shall be found to have sustained, together with such pre-judgment interest as will serve to make plaintiffs whole regarding general monetary damages.

* * *

89. The conduct of the defendants, jointly and severally, was negligent and/or intentional and/or reckless and proximately caused severe emotional distress to the plaintiffs.

* * *

DEMAND FOR RELIEF

* * *

1. That each and every plaintiff have declaratory judgment and such further relief including applicable injunctive relief – as shall be proper in conjunction with that declaratory judgment, with respect to each of the collective bargaining agreements heretofore described in the complaint, declaring that the express and implied obligations, as well as the intendment, spirit and purpose of each of said collective bargaining agreements in each of the respects hereinabove alleged in this complaint;

* * *

4. That GM be adjudged to have breached each of the collective bargaining agreements, as to each of the plaintiffs, in all of the foregoing respects, in violation of their respective rights;

* * *

RULE 29.1 LIST OF NON-WHOLLY OWNED SUBSIDIARIES OF GENERAL MOTORS CORPORATION

AC Bakony Kft. (Hungary)

AMBRAKE Corporation (USA)

AMRAAM International Licensing Company (USA)

American Manufacturing Systems, Inc. (USA)

Asset Leasing GmbH (West Germany)

Atlantic Satellites Ltd. (Ireland)

Aura Srl (Italy)

Banque de Credit General Motors (France)

Beijing International Information Processing Company Limited (Peoples Republic of China)

British Caledonian Flight Training Limited (England)

CAMI Automotive, Inc. (Canada)

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (West Germany)

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG (West Germany)

China Management Systems Corporation (China)

Comlinear Corporation (USA)

Convesco Vehicles Sales GmbH (West Germany)

DRB s.a./n.v. (Belgium)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)

Diavia SpA (Italy)

EPEC S.A. (Brazil)

Earth Observation Satellite Company (USA)

Emperion Corporation (USA)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)

Federal Computer Services Corp. (USA)

Federal Integrated Systems Corporation (USA)

G & F Company (USA)

GM Allison Japan Limited (Japan)

G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)

GMFanuc Robotics Canada Ltd. (Canada)

GMFanuc Robotics Corporation (USA)

GMFanuc Robotics Europe GmbH (West Germany)

GMFanuc Robotics Italia S.r.l. (Italy)

GMFanuc Robotics (U.K.) Ltd. (England)

GMFanuc Robotique France S.A.R.L. (France)

General Motors Bankgesellschaft m.b.H. (Austria)

General Motors del Ecuador S.A. (Ecuador)

General Motors France Automobiles S.A. (France)

H & D Radio Frequency Identification Products (USA)

H & R Company (USA)

HBC (USA)

HKV (USA)

Hughes-Kenwood RDSS, Inc. (USA)

IBC Vehicles Limited (United Kingdom)

I.K. Coach Co., Limited (Japan)

ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)

International Electro-Optical Industry Anonim Sirketi (Turkey)

Interpractice Systems, Inc. (USA)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

LEA GP Incorporated (USA)

Light Helicopter Turbine Engine Company (USA)

MET (USA)

Metal Casting Technology, Inc. (USA)

Millbrook Pension Management Ltd. (England)

Neodata Holdings, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

Nippon EDS Co., Ltd. (Japan)

Opel-Automobilwerk Eisenach-PKW GmbH (West Germany)

Opel-Wohnbau GmbH (West Germany)

Packard CTA Pty. Ltd. (Australia)

Packard Electric Vas kft (Hungary)

Saab Automobile AB (Sweden)

Shinsung Packard Company, Ltd. (Korea)

Societe Francaise des Amortisseurs de Carbon S.A. (France)

Sung San Company, Ltd. (Korea)

Systems Technology Management Corporation (Korea)

T.A.D. Communications Company (USA)

3DK Limited (United Kingdom)

Truck and Bus Engineering U.K., Limited (USA)

United Australian Automotive Industries Limited (Australia)

Vanguarda Componentes Automotivas, S.A. (Brazil)

Vehicle Test Technology, Inc. (USA)

No. 91-1151

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN J. ADKINS, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION
AND
INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE & FURNITURE WORKERS, AFL-CIO, LOCAL 801
AND
INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE & FURNITURE WORKERS, AFL-CIO,

Respondents.

On Petition For Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF OF IUE LOCAL 801 AND THE IUE IN OPPOSITION TO PETITION FOR CERTIORARI

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18

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW

(1) Whether the United States Court of Appeals for the Sixth Circuit erred in finding that Petitioners' fraud, misrepresentation, tortious interference and emotional distress claims, which arise out of a collectively bargained agreement, are preempted by § 301 of the Labor-Management Relations Act?

(2) Whether the United States Court of Appeals' finding of federal preemption in this case is in conflict with that of the Fifth Circuit Court of Appeals in *Wells v. General Motors Corporation*, 881 F.2d 166 (5th Cir. 1989)?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App., pp. 1-26) is reported at 946 F.2d 1201. The district court's opinion sustaining, in part,

Respondents' motions for summary judgment, is unreported. The district court's opinion granting, in part, Respondents' motions for reconsideration of the court's decision on petitioners' motion to remand is reported at 713 F.Supp. 1043.

JURISDICTION

The judgment of the court of appeals was entered in October 15, 1991. The petition for a writ of certiorari was filed on January 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

Respondent Unions, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Local 801 and International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, (hereafter referred to as the "Unions"), file this brief in opposition to the Petition for a Writ of Certiorari.

This action was originally filed by the *Adkins* plaintiffs (Petitioners in the case before this Court) in the Common Pleas Court of Montgomery County, Ohio, on September 19, 1983. Respondents in this case sought jointly to remove this matter to the United States District Court, pursuant to 28 U.S.C. Sec. 1441, on the ground that original jurisdiction under federal labor laws was vested in the courts of the United States.

The complaint filed by the *Adkins* plaintiffs in state court was of similar length and style, and contained the same allegations as the complaint Case No. C-3-

82-011, filed on January 18, 1982, in federal district court pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, and Section 101(a)(1) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sec. 411(a)(1). This latter action was disposed of by decision of the United States Court of Appeals for the Sixth Circuit in *Adkins v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC, et al.*, 769 F.2d 330 (6th Cir. 1985), which held that the claim that the Unions failed to represent the *Adkins* plaintiffs in negotiations which eliminated their seniority rights, and the claim that the Unions had denied them informed and meaningful participation in deliberating and voting for a collective bargaining agreement, were barred by the statute of limitations. See, *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

After the *Adkins* plaintiffs learned that their federal court action was time-barred, a case was filed in state court seeking a second bite at the proverbial "apple". This complaint was identical to that in the first case, and contains Four Counts. Count One alleged a claim against the Unions for a failure to properly negotiate and adopt the collective bargaining agreement. The Second Count claimed that the Unions made misrepresentations of fact during the ratification process. The Third Count alleged a breach by the Unions of fiduciary obligations owed to Petitioners. The Fourth Count alleged that in the negotiation and ratification process the Unions caused emotional distress to the Petitioners.

These legal attacks against Respondent Unions had their genesis in the sale by General Motors of the assets of its Frigidaire Division to White Consolidated

Industries. General Motors retained the plants in which the Frigidaire Division conducted its operations in Dayton in order to convert them to a Chevrolet truck assembly plant and a Chevrolet diesel engine plant. At the time of this sale Respondent Unions represented the factory workers of the Frigidaire Division of General Motors, and of the Delco Air Conditioning Division of General Motors, which had split from Frigidaire in 1974. The Delco Air Conditioning employees received higher wage rates than Frigidaire employees because they were involved in the automotive industry whereas the Frigidaire employees were in the appliance industry.

At the time of the sale, a collective bargaining agreement, known as the "Bridge Agreement," was in effect which permitted Frigidaire employees to "flow" or transfer to Delco Air to receive higher rates when Delco Air needed additional employees. It also allowed Delco Air employees to bump Frigidaire employees to avoid being laid off if business declined. This Bridge Agreement provided that Frigidaire employees would retain their flow rights until all employees had been given an opportunity to transfer to Delco Air and 900 new Delco Air employees hired. Through 1979, some 2000 Frigidaire employees had transferred to Delco Air and some 3500 other Frigidaire employees had retained but not exercised their flow rights under the Bridge Agreement. There were also some 2500 Frigidaire employees hired after January 1, 1977, who had no rights under the Bridge Agreement. By its terms, this Bridge Agreement was to expire in September 1979.

Because the conversion from Frigidaire to Chevrolet was scheduled to take at least two years and

would result in the interim layoff of the Frigidaire employees, the Unions and General Motors held a series of meetings in February 1979 to address the effects of the layoff on the Frigidaire employees and to secure these workers employment at the Chevrolet plants. At this time, Delco Air employees were all actively employed, and the automobile industry was booming. As a result of these meetings, the Unions and GM reached a tentative agreement which gave Frigidaire employees the right to be employed at Chevrolet by order of seniority, and the Unions were recognized as representatives of factory employees at these Chevrolet plants. The parties also agreed to terminate the Bridge Agreement and, therefore, Delco Air employees' right to transfer to these Chevrolet plants.

These Agreements were presented for ratification in February 1979, by the members of Local 801, whose members included the employees of both Frigidaire and Delco Air. As employees of Delco Air, Petitioners were eligible to participate in the ratification of these agreements, which were ratified by the members of Local 801 and became effective on February 26, 1979.

In late 1979, the automobile industry began to suffer reductions in sales and, as a result, layoffs at Delco Air commenced and the lawsuits described above were initiated by Petitioners.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT PETITIONERS' STATE LAW CLAIMS WERE PREEMPTED IN ACCORDANCE WITH WELL-ESTABLISHED PRECEDENT.

The Petitioners argue that the Court of Appeals erred in deciding that all counts of this complaint were preempted. Petitioners further argue that review is warranted for this Court to clarify established precedent in regard to the issue of federal preemption in labor law cases.

Petitioners fail to recognize that since the time their action was filed, this Court has issued decisions cogently clarifying precisely when labor law claims asserted under state law are preempted by federal law.

The first in the series of cases describing the preemptive effect of Section 301 of the LMRA was *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) in which the Court emphasized that the consequences flowing from breaches of a collective bargaining agreement must be resolved by reference to federal law, whether the question arises in the context of an action for breach of contract or an action sounding in tort. As the Court held, to determine whether an alleged state claim is preempted by federal law, the critical question is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. Further, "[w]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of the agreement made between parties in a labor contract, that claim must either be treated as a Section 301 claim . . . or dismissed as pre-empted by federal labor contract law." *Id.* at 220

The Court addressed this issue again in *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987). In concluding that the plaintiff's negligence claim was preempted by Section 301, the Court indicated that where a union's tort liability could not be determined without considering "whether the collective-bargaining agreement in fact placed an implied duty of care on the Union", the matter was preempted because of the overwhelming need to create uniformity in the interpretation of the terms of collective bargaining agreements.

This Court again dealt with the preemptive force of Section 301 in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), which will be addressed more fully below.

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S.399 (1988) shed further light on the issue of preemption. In holding that the issue to be addressed in determining whether a state law claim was preempted is whether it is necessary to interpret the collective bargaining agreement, the Court concluded that a retaliatory discharge for filing a workers' compensation claim was not preempted because the matter turned on state law on retaliatory discharge which did not require an interpretation of the collective bargaining agreement.

From these cases, the Court has clearly enunciated the factors which determine whether an alleged state law claim is preempted or not. Initially, the fact that the claim is couched in terms of state law violations is not dispositive, as there are at least two separate and distinct grounds for preemption. One, when state law claims involve rights which flow directly from the labor contract; and secondly, when claims are de-

pendent upon analysis of the collective bargaining agreement, regardless of whether such claims are based upon rights which arise from the agreement itself.

Moreover, in considering the issue of preemption, actions against labor unions often involve claims of failure of fair representation which are governed by federal law. Thus, claims by members that they were not represented by their union either in contract negotiations or contract administration, are governed by federal law. See *Air Line Pilots Association v. O'Neill*, ___ U.S. ___ 111 S. Ct. 1127(1991); and *Vaca v. Sipes*, 386 U.S. 171 (1967).

Prior to bringing the instant case, Petitioners had unsuccessfully sued under the Labor Management Reporting and Disclosure Act, Sec 101(a)(1), in regard to the alleged failure of the Unions to properly notify them as to the ratification of the collectively bargained agreement which abrogated the Bridge Agreement. That action was lost because the statute of limitations period had run before the suit was filed.

Contrary to the arguments contained in Petitioners' Brief, the Court of Appeals below followed preemption doctrines formulated by this Court in finding that Plaintiffs' claims must be dismissed in their entirety. Petitioners' first count is that the Unions interfered with their contract rights in the "negotiation, manner of adoption, implementation and enforcement of certain bargaining agreements." This claim is obviously one grounded in federal law and Petitioners do not appear to contend that the Court of Appeals' preemption finding was improper.

Petitioners' second count involves allegations of misrepresentation of fact in the ratification process

and likewise requires judicial interpretation of the terms of the bargaining agreement to determine if such misrepresentation occurred. Such claim is so intertwined with an understanding of the agreement, that it must be preempted. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The District Court and Court of Appeals so found, and these findings are solidly within the preemption doctrine established by this Court in the recent cases cited above.

Petitioners third claim is that the Unions tortiously interfered with their contract rights or business relationships. The Court of Appea disposed of this allegation by deciding:

> In this case, in order to adjudicate plaintiffs' claim that a contract existed under state law, the court would have to determine that plaintiffs were offered "seniority rights" based on the "bridge agreement" after the 1979 collective-bargaining agreement, that they accepted the offer, that there was consideration, and so on. Or the court may have had to determine that plaintiffs were induced to believe that their asserted "seniority rights" under the "bridge agreement" were intact or would be respected, even if not intact, and that they relied on these representation justifiably and to their detriment. An exercise such as this necessarily involves the court in determining what the "seniority rights" under the "bridge agreement" are. It follows that adjudicating the plaintiffs' tortious interference claim necessarily involves an analysis of a collective-bargaining agreement because the contractual relation nec-

> essary to the claim is based on the representations of the president of Local 801 that their "seniority rights" would continue. For this reason, plaintiffs' tortious interference claims are fully preempted. The court below did not err in so holding. At page 20.

Petitioners argue that the rationale of *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) requires a different result than reached by the Court below. However, the facts of the instant case are not analogous to those critical facts of the *Caterpillar* case. Unlike *Caterpillar*, Petitioners were always members of the Unions and covered by the contracts negotiated by the Unions. Thus, their claims clearly require the interpretation of bargained-for agreements and the application of federal law. Clearly, the Court of Appeals was correct in its application of the *Caterpillar* rationale if not its holding, with respect to the allegations of the present case.

Petitioners further contend that after ratification of the elimination of the Bridge Agreement, the President of the Local Union misrepresented to them as to whether the Bridge was actually abrogated and argue that the *Caterpillar* case requires a different result than that found by the lower courts. However, as the courts below found, to decide whether there was a misrepresentation requires an interpretation of the collective bargaining agreement and is, therefore, an allegation, however framed, preempted by federal law.

The last claim of the Petitioners' case is that the conduct of the Unions caused severe emotional distress to these union members, or the allegation that by proposing modifications to the collective bargaining

agreement and in the procedures utilized to ratify these agreements, the Unions caused Petitioners emotional distress.

Obviously, this claim requires an interpretation of the bargaining agreement to determine what modifications in the applicable agreement were made or whether the Unions did or did not properly inform Petitioners of changes made in the collective bargaining agreements. To determine if the contractual change caused Petitioners emotional distress, a court has to interpret the terms of the agreements as they existed before and after the change to decide whether the Petitioners were adequately notified of the changes and the consequences of negotiations. Petitioners rights and the conduct which is at issue in this allegation are "inextricably intertwined" with the actual terms of the collective bargaining agreement. This Court stated in *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 213 (1985), "if the . . . state tort law purports to define the meaning of the contract relationship, that law is preempted." The need for uniformity in the interpretation of contract terms precludes Petitioners from evading the preemptive effect of Section 301 by framing their claim as a state law tort action. *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987). The arguments advanced by Petitioners to show that this state-law claim is not preempted are spurious and not supported by the decisions of this Court.

As bargaining representatives, the Unions have a wide range of reasonableness in carrying out their representation duties. The emotional distress claim by Petitioners is nothing more than an allegation that the Unions violated the duty of fair representation

owed to Petitioners cast in state law terms. It is well established that federal law governs this type of claim, and equally clear that an action brought against a labor union for claimed misrepresentations made during ratification meetings are a violation of the duty of fair representation. *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985) and *Anderson v. United Paper Workers International Union*, 641 F.2d 574 (8th Cir. 1981). It is equally settled, as the Court of Appeals found below, that such a cause of action is completely preempted by federal law. *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990).

II. THE PETITIONERS ERR IN ASSERTING A CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THE PRESENT CASE AND THE OPINION OF THE COURT OF APPEALS IN *WELLS V. GENERAL MOTORS CORPORATION*, 881 F.2d 166 (5th Cir. 1989).

The *Wells* case, so heavily relied upon by Petitioners, was filed by a group of employees who had received separation pay pursuant to an agreement negotiated by the employees' union and General Motors. The suit in *Wells*, however, was filed only against General Motors based upon an allegation that a representative of General Motors informed these workers that they would be eligible to be rehired, or, in the reverse, that representations by General Motors were false and injurious.

The *Wells* Court held that because the case *did not* require an interpretation of any collectively-bargained agreement, the action was not preempted by federal law. Rather than being in conflict with *Wells*, the rationale of the Court of Appeals for the Sixth Circuit

in the instant case, is based upon precisely the same reasoning, albeit radically different facts. That both cases involved charges of alleged "misrepresentation" does not render their dispositions to be conflicting. In this case, misrepresentations are charged against representatives of the Unions, which is therefore a question concerning a failure to properly represent these workers, an issue governed by federal law and the Court below properly found the matter to be preempted.

Accordingly, it is submitted that the Petitioners have not shown a conflict between the circuits in order to warrant review by this Court of this case.

For this essential reason, the decision of the Court below is not in conflict with the rationale of the *Wells* court, or any of the other decisions referred to by Petitioners.

CONCLUSION

On the basis of the foregoing and arguments submitted by Respondent General Motors, it is respectfully submitted that the Petitioners' Writ for Certiorari should be denied

Dated: April 15, 1992.

Respectfully submitted,

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Respondents.

REPLY TO BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR APPEALS FOR THE SIXTH CIRCUIT

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REPLY

Respondents have alleged that Petitioners seek certiorari because of a factual dispute in a case where the lower court has ruled that pendent state claims are preempted under federal law but when essentially the same claims were previously before the same federal court, the court "dismissed (without prejudice) plaintiffs' pendent state state law claims for want of substantial federal question." Res. GMC at 5. This glaring inconsistency in the record and the parties dispute over the facts is not the reason certiorari is requested but rather backround.

The heart of most of the reasons submitted for granting certiorari is simply the need to define controlling terms and provide a methodology for a workable analytical approach which would foster consistency and heal intercircuit divisions in Section 301 preemption cases. Petitioners

suggest a possible approach to solving the problem while curing the errors in this case. Pet. at 30-31 and 35-47.

It is noteworthy that none of the Respondents so much as attempted to define controlling phrases, such as; "substantially dependent on analysis", or "peripherally concerned", or "inextricably intertwined", or "tangentially related". Moreover, none of the Respondents were able to identify the methodology employed in this case (or any other). This is simply because a fair reading of the lower courts' decisions reveals an absence of methodology which resulted in a plethora of errors, in the mists of unsettled law, highlighted by a conflict between the Fifth and Sixth Circuits.

It is also noteworthy that in the process of avoiding the central questions in the petition Respondents unwittingly identified part of the conflict between the Fifth and Sixth Circuits. As Respondent's observed, the "court of appeals

recognized that state claims wholly independent of any collective bargaining agreement are not preempted." Res. GMC at 17 (emphasis added). The Sixth Circuit requirement that state claims be so isolated from the CBA as to be " wholly independent" is significantly different than the standard applied in Fifth Circuit. The Fifth Circuit has intentionally emphasized the word "substantially" in the phrase "substantially dependent on analysis of the terms [in a CBA]". Wells v. General Motors Corp. (5th Cir 1989) 881 F.2d 166,173. Moreover, the word "analysis" in the Wells decision emphasized the need to examine the contents of the CBA. Id at 173. The Fifth Circuit would not preempt unless the CBA "contains provisions that govern, or reasonably might be construed as governing, the circumstances at hand." Id at 174 (emphasis added). Simply put, the Fifth Circuit denies a preemption claim unless there is a substantial connection with a CBA such that a provision therein would govern the dispute. This standard is significantly different that the Sixth Circuits

"wholly independent" standard.

The conflict between the circuits is reinforced by the unions' response which, like the Sixth Circuit, eliminates the term "substantial" from "substantially dependant on analysis" standard. Under the test applied against Petitioners preemption occurs " when claims are dependant upon analysis of the collective bargaining agreement..." Res. IUE at 7-8. Not only is the articulated standard in conflict with the Fifth Circuit but its improper application furthers additional conflicts. The Sixth Circuit preempted Petitioners state claims of promissory estoppel and fraudulent misrepresentation (relating to promises of jobs) on the basis of the court's decisions to look to the CBA to see if a nonexistent bridge agreement was in there. See Res. IUE at 10. Such a purusal of the CBA or even applying some tangential facet of the CBA to support the state law claim requires preemption in the Sixth Circuit, but does not result in preemption in the Fifth Circuit. Wells v. General

Motors Corp. supra.

This rift was recently heightened and expounded upon by a decision of a federal district court in Wisconsin which emphasized the terms "substantial" and "analysis" in the phrase "substantially dependant upon analysis [of a CBA]" and held:

> Lifting [a]... fact from [the CBA] does not require interpretation of the agreement. It does not undermine preemption policy which is based on the mandate that federal law be uniform when interpreting collective bargaining agreements so that state and federal law do not assign different meaning to contract terms.... Plaintiff's claim does not conflict with preemption concerns. It can be litigated pursuant to state law without interpreting terms included in the collective bargaining agreement.

Leher v. Consolidated Papers Inc. (Mar. 2, 1992)

1992 U.S. Dist Lexis 3448 at Lexis 16-17 (emphasis added). Under the approach in the Leher case, federal Section 301 preemption interests are largely limited to situations requiring interpretative analysis of a CBA and then only where the issues are significant to underlying federal interest. Id at Lexis 12-17. The Leher case appears to look in its preemption analysis to Black Letter Law and follows a methodology similar to that suggested by Petitioners for resolving preemption case especially where issues are only tangentially related to a CBA and only peripherally concerns federal interest. Pet. at 30-33 and 35-47.

The approach suggested by Petitioners, or one similar to it, would be instrumental for identifying those cases where recognition of predominate state concerns actually advances federal policy. Pet. at 30-33, 49-53, 55-59, and 60-62.. For Petitioners the application of proper standards and/or proper methodology would result in recognition that their state causes of

action are sufficiently independent to avoid preemption and only tangentially concern the CBA.

Obviously, the Sixth Circuit did not come close to applying the standard advanced by Leher cases. The Sixth Circuit by not defining its terms or structuring a proper methodology analyzed this case (and others like it) under something akin to a relationship standard. Though the Respondents attempt to distance themselves by claiming the Sixth Circuit's use of that term was only a misnomer or quote from the district court, Res. GMC at 16-17, the simple fact is that the quote is in context and that portion of the district court decision was adopted by the circuit court. More importantly, the "wholly independent" standard espoused by the Sixth Circuit and advanced by Respondents is a difference without distinction and conflicts with the Fifth Circuit and the decisions by this Court. The Respondents denial of a conflict or need for clarification is simply wrong. The cases cited by Petitioners not only

established the conflict but often comment on the need for resolution. See Pet. at 27-28.

Respondents IUE and Local 801 unwittingly expand upon an additional reason for granting certiorari. These Respondents insist that the Sixth Circuit is correct in holding that a union is immune under federal preemption standards from any state claim. Res. IUE at 11-12. Petitioners naturally disagree and note that such jurisprudence, impermissibly and without precedent, controlled in part the dismissal by the Sixth Circuit of Petitioners claims. Pet. at 19-20, 23-24 and 54-55. There is nothing in the NLRA to suggest that congressional intent was to immunize unions from their common law intentional torts. Unions are no more creatures of federal government (or the NLRA) than businesses. Both existed long before the NLRA. The NLRA sought to require negotiation and mediation and not to provide a partial shield from intentional wrongdoing or create immunity from state law. That an intentional tortfeasor is a

union or union official is a matter of peripheral concern to Federal interests and is overridden by the strong state interest in providing redress for victims of intentional wrongs. Such wrongs and wrongdoers have, at best, only a tangential relationship to any CBA. The fact that the intentional wrong is less physically direct than in the earlier days of the labor movement does not create a federal protection and policy of endorsement for injuring others in a less direct, more sophisticated, but just as debilitating manner. See Pet. at 31-34. In view of the Court's recent holding that unions are not immune from federal suit by their members under Section 301, Wooddell v. International Brotherhood of Electrical Workers (1991) 112 S.Ct. 494, the next logical question in the progression is whether unions are immune from state common law suits. Thus, the instant case is specially suit for certiorari since it can resolve directly and indirectly many of the nagging issues plaguing the administration of justice in the circuit and district courts relating not only to the

above but also proper application of Court's standards in state common law fraud, contract/promissory estoppel and tortious interference claims.

One final note as to the emotional distress claims. Respondents applaud the Circuit Court's dismissal of the claim on the basis of absence of magic words. Res. GMC at 29. Nonetheless, the District Court held that some of Respondents' conduct could support the outrageousness element of intentional infliction of emotional distress under Ohio Law. The Circuit Court's approach was without advanced warning of any sort. Moreover, we are long past the days of code or form pleadings. As found by the District Court, petitioners complaint sufficiently pleads the claim so as to put the Respondents on notice as to the element of 'outrageousness' (and may rise to this level of misconduct). For reasons stated throughout the petition and at pages 60-64, certiorari should be granted on this issue as well.

CONCLUSION

For the reasons stated herein and more fully set forth in the petition of a Writ of Certiorari it is respectfully submitted that Certiorari be granted.

Respectfully Submitted,

Dwight D. Brannon
Counsel of Record
for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Petition for Certiorari has been served upon each of the following counsel for the respective respondents, GMC, IUE, and Local 801, by regular United States Mail this 9 day of May 1992 addressed to their respective following office addresses:

Joseph P. Buchanan, Esq.
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Respectfully Submitted,

_____

Dwight D. Brannon
Counsel of Record
for Plaintiffs-Petitioners

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

50TH CASE of Level 1 printed in FULL format.

KATHLEEN LEHER, Plaintiff, v. CONSOLIDATED PAPERS, INC., Defendant, v. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, Proposed Intervenor.

91-C-900-C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

1992 U.S. Dist. LEXIS 3448

March 2, 1992, Filed and Entered

DISPOSITION: [*1] DENIED. GRANTED.

COUNSEL: COUNSEL FOR KATHLEEN LEHER, PLAINTIFFS: LINDA S. GUARTARO, SCHNEIDMAN, MYERS, DOWLING, P. O. BOX 442, MILWAUKEE, WI 53201-0442, (414)271-8650.

COUNSEL FOR CONSOLIDATED PAPERS, INC., DEFENDANTS: KATHLEEN M. MORAN, SEYFARTH, SHAW, FAIRWEATHER AND GERALDSON, 55 E. MONROE ST., SUITE 4200, CHICAGO, IL 60603, (312)346-8000.

COUNSEL FOR WISCONSIN DILR (INTERVENOR): RICHARD MORIARTY, ASSISTANT ATTORNEY GENERAL, P.O. BOX 7857, MADISON, WI 53707, (608)267-2796.

JUDGES: CRABB

OPINIONBY: BY THE COURT; BARBARA B. CRABB

OPINION: OPINION AND ORDER

Plaintiff filed this complaint with the Wisconsin Department of Industry, Labor and Human Relations, Equal Rights Division (DILHR), claiming that defendant violated the Wisconsin Family and Medical Leave Act, Wis. Stat. § 103.10. Defendant removed the case to this court pursuant to 28 U.S.C. § 1441(a). It is before the court now on DILHR's motion to intervene and on DILHR's and plaintiff's motions to remand the case to the Equal Rights Division.

DILHR contends that 28 U.S.C. § 2403(b) gives it an unconditional right to intervene in this case and that it may intervene as of right pursuant to Fed. R. Civ. P. 24(a). DILHR and plaintiff assert that plaintiff's claim is not preempted [*2] by federal law and that this case was removed improperly.

Defendant does not oppose DILHR's motion to intervene. However, it contends that plaintiff's claim is preempted completely by federal labor law, specifically the National Labor Relations Act and Section 301 of the Labor Management Relations Act, so that removal to federal court was proper.

I conclude that 28 U.S.C. § 2403(b) does not confer an unconditional right upon DILHR to intervene in this case because the constitutionality of the Family and Medical Leave Act is not being called into question. Further, DILHR does not meet the prerequisites of Fed. R. Civ. P. 24(a) to intervene as of right. However, I will consider DILHR's views as those of an amicus curiae.

I conclude also that plaintiff's claim under the Family and Medical Leave Act does not require interpretation of the collective bargaining agreement between plaintiff and defendant and is not substantially dependent on the agreement. Therefore, the claim is not preempted by § 301 and this case will be remanded to DILHR.

For the sole purpose of deciding these motions, I find from the complaint and from the record that the following facts are undisputed.

UNDISPUTED FACTS [*3]

Plaintiff is employed by defendant in its Employee Benefits Department as a claims processor. Her exclusive bargaining agent and representative with respect to terms and conditions of employment is Local 95 of the Office and Professional Employees' International Union.

On August 22, 1991, plaintiff requested that defendant grant her a three week family leave under the Family and Medical Leave Act (for convenience, I will refer to the act as the leave act). Plaintiff asked defendant to allow her to substitute two weeks' accumulated sick leave for two weeks of family leave. Plaintiff was not sick at the time she requested this leave.

On August 29, 1991, defendant granted plaintiff's request for a three week family leave without pay and informed plaintiff that she could substitute her accrued paid vacation time for family leave. Defendant denied the requested substitution of sick leave because plaintiff was not sick and because plaintiff's current employment contract did not provide for accumulated sick leave.

On September 17, 1991, plaintiff filed a complaint with the State of Wisconsin, DILHR, Equal Rights Division, claiming that defendant violated the leave act. On October 4, 1991, [*4] defendant submitted a responsive statement to the complaint. On October 16, 1991, the Equal Rights Division's investigator found that there was probable cause to believe that defendant had violated the act by refusing to allow the substitution. On October 21, 1991, defendant filed its Notice of Removal.

The leave act provides that:

(5) Payment for and restrictions upon leave. (a) This section does not entitle an employe to receive wages or salary while taking family leave or medical leave.

(b) An employe may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer.

Wis. Stat. § 103.10(5).

Wis. Admin. Code § Ind 86.03(1) states:

Substituting leave. (1) At the option of the employe an employe entitled to family or medical leave under the Act may substitute, for any leave requested under the Act, any other paid or unpaid leave which has accrued to the employe.

The collective bargaining agreement between Local 95 and defendant provides that employees with 10 or more years' seniority with the company are allowed 500 hours of annual sick leave. Plaintiff has been employed by defendant for over ten years.

OPINION

[*5]

DILHR's Motion to Intervene

DILHR bases its motion to intervene on its contention that defendant has called the constitutionality of the leave act into question, giving it a right to intervene under 28 U.S.C. § 2403(b), which states:

In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question, the court shall . . . permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality. . . .

Defendant has argued preemption. It is not at all clear whether this calls the constitutionality of the leave act into question.

In Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), rev'd on other grounds, 481 U.S. 69 (1987), the Court of Appeals for the Seventh Circuit noted in dicta that "there is a question whether section 2403(b) is meant to apply to cases where the only constitutional challenge is under the supremacy clause, that is, where the state statute is contended to be in conflict [*6] with a federal statute." Id. at 259. The reasoning is that a finding of preemption may still leave the state statute in effect. See National Metalcrafters v. McNeil, 784 F.2d 817, 828-29 (7th Cir. 1986) (although state statute found to be preempted in this case, in the majority of cases, the statute can still be applied in employment settings).

Defendant is not arguing that the leave act is unconstitutional It is arguing that the statute is preempted as it applies to plaintiff's claim. A finding of preemption would not render the statute unconstitutional or call its constitutionality into question. Therefore, I conclude that 28 U.S.C. § 2403(b) does not give DILHR a right to intervene in this case.

I turn next to DILHR's alternative contention: that it has a right of intervention pursuant to Fed. R. Civ. P. 24(a). That rule provides that:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated [*7] that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

DILHR contends that (1) it has an interest in this case to assure that its statutory duty to administer the leave act is not subverted by employers' attempts to recast employees' leave act claims into claims under federal law; (2) if employers can evade DILHR's administration of the leave act, DILHR's

ability to protect that statutorily imposed interest may be impaired or impeded; and (3) because DILHR must enforce the leave act as to the private sector and all employers in Wisconsin, this interest cannot be expected to be represented adequately by the existing parties.

Although DILHR appears to have a valid interest in this case, it has not shown that its interest cannot be represented adequately by plaintiff. DILHR seeks to intervene as to jurisdictional issues only; it argues that plaintiff's claim is not preempted and that this case should be remanded. Plaintiff is pursuing the same goal. Her interest is as strong if not stronger than DILHR's because, according to her, she [*8] could lose any remedy she has under state law if this case is not remanded. I conclude that DILHR has not shown a basis for intervening as of right under Fed. R. Civ. P. 24(a)(2).

Although DILHR is not a party to this case and cannot move personally to remand this case, it could have moved for leave to file briefs as amicus curiae in support of its position on the jurisdictional issues. Its briefs in support of remand will be considered as briefs of an amicus curiae.

Motion to Remand

The removal statute is to be construed narrowly. Any doubts are to be resolved in favor of state court jurisdiction. See Somlyo v. J. Lu-Rob Enterprises, Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941)). The removing defendant bears the burden of showing that the case was removed properly. Northern Illinois Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 273, n.1 (7th Cir. 1982).

Ordinarily, a case may not be removed to federal court if it could not have been brought there originally. 28 U.S.C. § 1441(a); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). [*9] Under the well-pleaded complaint rule, whether federal jurisdiction exists is determined from the face of the plaintiff's complaint. A preemption defense cannot form the basis of federal jurisdiction. Stikes v. Chevron USA, Inc., 914 F.2d 1265, 1267 (9th Cir. 1990) (citing Caterpillar, 482 U.S. at 392).

The complete preemption doctrine is an exception to this rule. "Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim. . . ." Caterpillar, 482 U.S. at 393. Section 301 of the Labor Management Relations Act has preemptive force. It provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (a).

The Supreme Court has decided a number of cases involving the preemptive [*10] effect of § 301. The common thread running through the Court's analyses is that "an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement." Lingle v. Norge Division

of Magic Chef, Inc., 486 U.S. 399, 413 (1988). In Lingle the petitioner was discharged for filing an allegedly false workers' compensation claim. While arbitration was proceeding, petitioner filed a retaliatory discharge action in Illinois state court and respondent removed the action to federal court, alleging § 301 preemption. The Supreme Court found that under Illinois law, petitioner had to show "that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." Lingle, 486 U.S. at 407 (citing Horton v. Miller Chemical Co., 776 F.2d 1351, 1356 (7th Cir. 1985)). In the Court's view, neither of these elements required interpretation or construction of the collective bargaining [*11] agreement, thus, the state law claim was deemed to be "independent" of the collective bargaining agreement. Id. The Court reiterated that "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" Lingle, 486 U.S. at 410, n.10 (citing Electrical Workers v. Hechler, 481 U.S. 851, 859, n.3 (1987)).

In Hechler, an employee brought a state law tort suit against her union for breach of the union's duty to provide her with a safe workplace. To assess liability, a court would have had to ascertain (1) whether the collective bargaining agreement imposed an implied duty of care on the union; (2) the scope of the duty; and (3) to what extent the union's duty extended to the employee's allegations. Hechler, 481 U.S. at 862. Therefore, the Supreme Court held, the claim was not "sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301." Id. at 851. See also United Steelworkers of America v. Rawson, U.S. , 110 S. Ct. 1904 (1990) [*12] (where the alleged duty was one arising from the agreement, a tort claim against the union was not independent of the collective bargaining agreement); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (state law tort claim against an employer may be preempted by § 301 if the duty to the employee is created by a collective bargaining agreement).

The Court of Appeals for the Seventh Circuit has held that the mandate of Lingle is "straightforward" in that it requires preemption only if application of state law requires complete interpretation of a collective bargaining agreement. Nelson v. Central Illinois Light Co., 878 F.2d 198, 201 (7th Cir. 1989) (complaint alleging discharge in retaliation for filing a workers' compensation claim was not preempted by federal labor law because the elements of the claim could be evaluated without interpreting the collective bargaining agreement); Sluder v. United Mine Workers of America, 892 F.2d 549 (7th Cir. 1989) (coal miner's state law negligence claim preempted by § 301 where the scope of the union's duty to conduct inspections could not be defined under Illinois law without reference [*13] to the collective bargaining agreement); Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989) (employee's claim for intentional infliction of mental distress was preempted because a court would be required to determine whether the employer's conduct was authorized by the explicit or implicit terms of the agreement). Federal labor policy does not prevent states from granting substantive rights independent of the collective bargaining agreement to its workers, id. at 569 (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. at 212), as long as the claim can be resolved without interpreting the agreement itself. Id. at 569-570 (citing Lingle, 486 U.S. at 409).

In determining whether plaintiff's claim is preempted by § 301 the first step is to examine the elements of her claim. Because it is based upon a statute that is only two years old, there is little precedent delineating the elements clearly. However, from decisions of DILHR and decisions of the state court reviewing DILHR's conclusions, it appears that plaintiff must prove that (1) she was covered by the Family and Medical [*14] Leave Act at the time she requested the leave; (2) she requested a substitution for family leave; (3) the employer provided the type of leave requested; (4) the substituted leave had accrued to her; and (5) the employer denied the substituted leave. See Loeffler v. St. Luke's Hospital, ERD Case No. 9050781 (ALJ Grandberry 8/30/90), aff'd, Milwaukee County Circuit Court, Case No. 90-CV-012-780 (Judge McCormick 7/26/91).

The parties do not dispute that plaintiff was covered by the leave act or that she asked for leave under the act. This makes the second step of the analysis the determination whether defendant provided the type of leave requested, and, if so, whether the requested substituted leave had accrued to plaintiff.

The nub of defendant's argument is that the terms of the collective bargaining agreement will have to be interpreted to resolve the second step of the analysis: determining the type of leave defendant provided and whether that leave had accrued to plaintiff. Plaintiff and DILHR maintain that no such interpretation is required; all that is necessary is "looking to" the agreement to see what is provided.

Whether defendant provides sick leave does not require [*15] interpretation of the collective bargaining agreement. The more difficult question is whether the accrual provision of the leave act requires interpretation of the collective bargaining agreement. Defendant contends that under the terms of the contract, employees are not allowed to "accumulate" or otherwise accrue sick leave allowance that is unused at the end of the year and employees are not compensated for unused sick leave. Defendant contends also that plaintiff could not have "accrued" any sick leave because she was not sick at the time she requested the sick leave substitution.

If these matters raised by defendant are relevant to deciding plaintiff's claim, the fact-finding body would be interpreting the collective bargaining agreement's policy on sick leave. In my view however, the definitions defendant assigns to the word "accrue" are irrelevant. It is the leave act's definition that controls. Whether defendant permits its employees to be compensated for sick leave or to carry unused sick leave over into the next year and whether plaintiff was sick at the time she requested the substitution are irrelevant to determining how much sick leave had "accrued" to plaintiff within [*16] the meaning of the leave act. The plain language of the statute is that if an employer provides sick leave, an employee may substitute that leave for family leave. The plain language of the agreement between plaintiff's union and defendant states that an employee with more than 10 years' seniority has 500 hours of annual sick leave.

Lifting this fact from this agreement does not require interpretation of the agreement. It does not undermine preemption policy, which is based on the mandate that federal law be uniform when interpreting collective bargaining agreements so that state and federal law do not assign different meanings to contract terms. Douglas, 877 F.2d at 569 (citing Local 174, Teamsters v. Lucas

Flour Co., 369 U.S. 95 (1962)). Plaintiff's claim does not conflict with preemption concerns. It can be litigated pursuant to state law without interpreting terms included in the collective bargaining agreement.

I conclude that plaintiff's claim based on the Wisconsin Family and Medical Leave Act is not a claim founded directly on rights created by the collective bargaining agreement and is not "substantially dependent on analysis of a collective-bargaining [*17] agreement." Lingle, 486 U.S. at 410 n.10 (citing Hechler, 481 U.S. at 859 n.3). I conclude therefore, that this case was removed improperly and that it must be remanded to DILHR for further proceedings.

ORDER

IT IS ORDERED that the motion to intervene of the Department of Industry, Labor and Human Relations is DENIED.

FURTHER, IT IS ORDERED that plaintiff's motion to remand this action to the Department of Industry, Labor and Human Relations is GRANTED. The Clerk of Court is directed to transmit the record of the case to the department.

Entered this 2d day of March, 1992.

BY THE COURT:

BARBARA B. CRABB

District Judge